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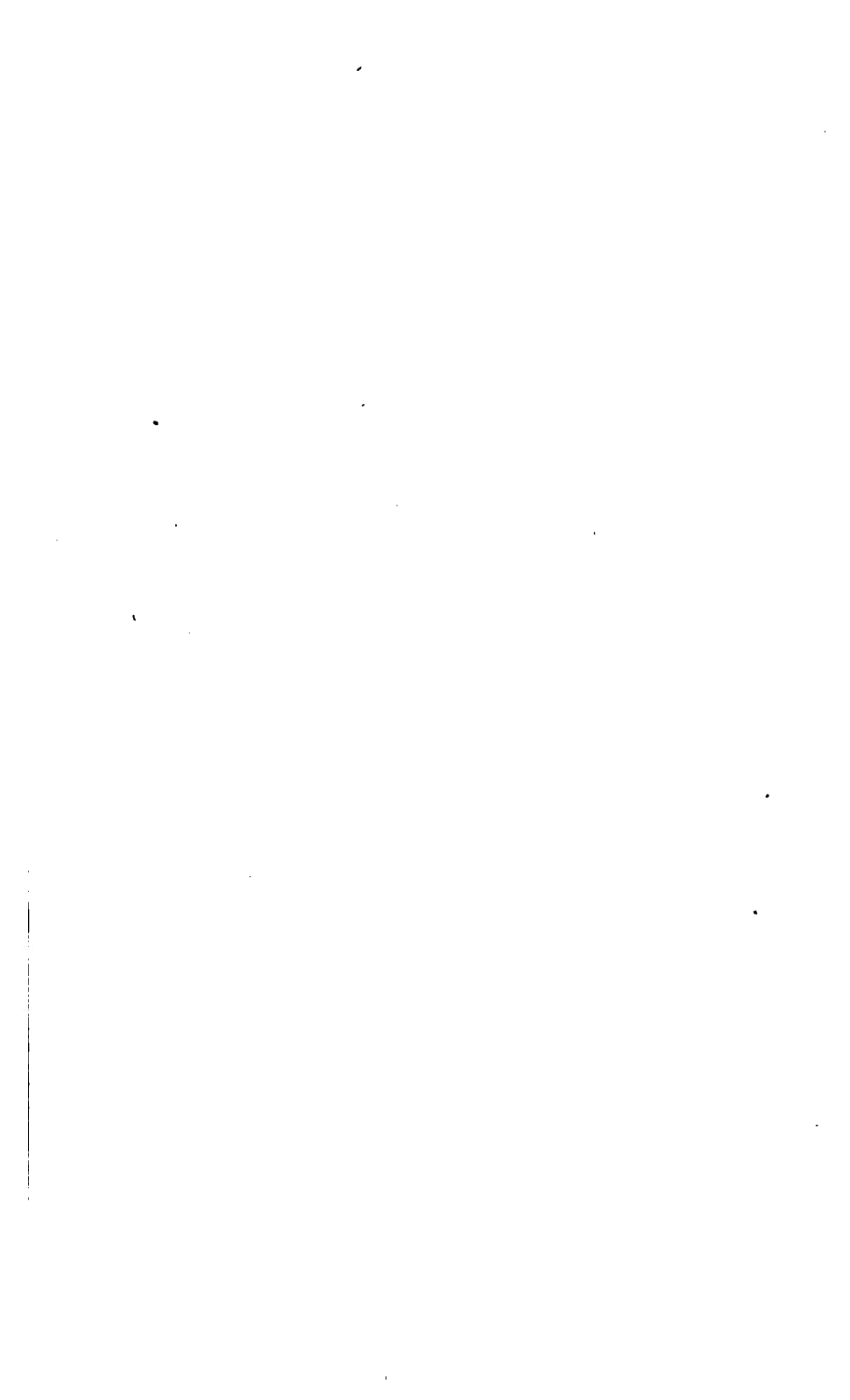


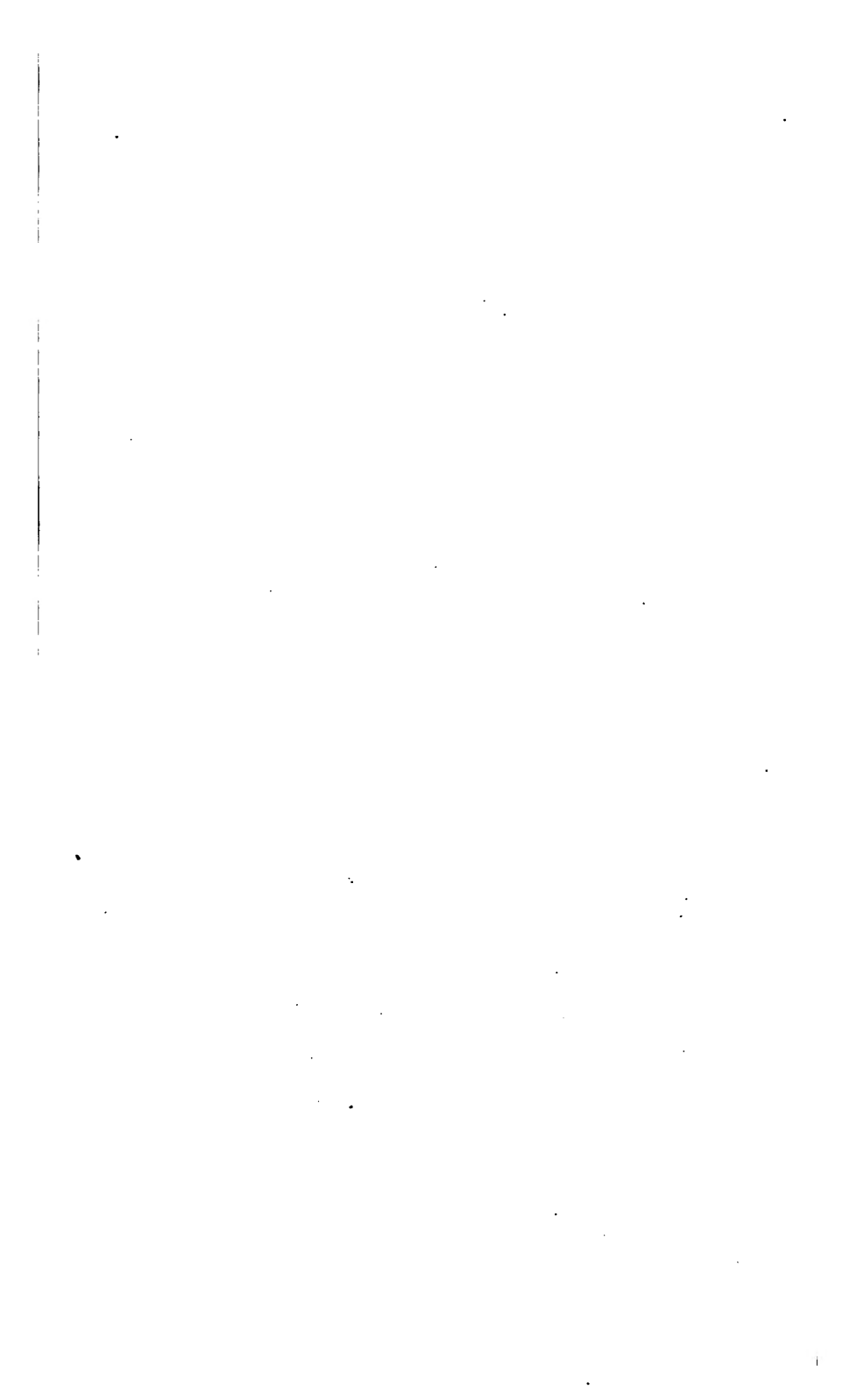
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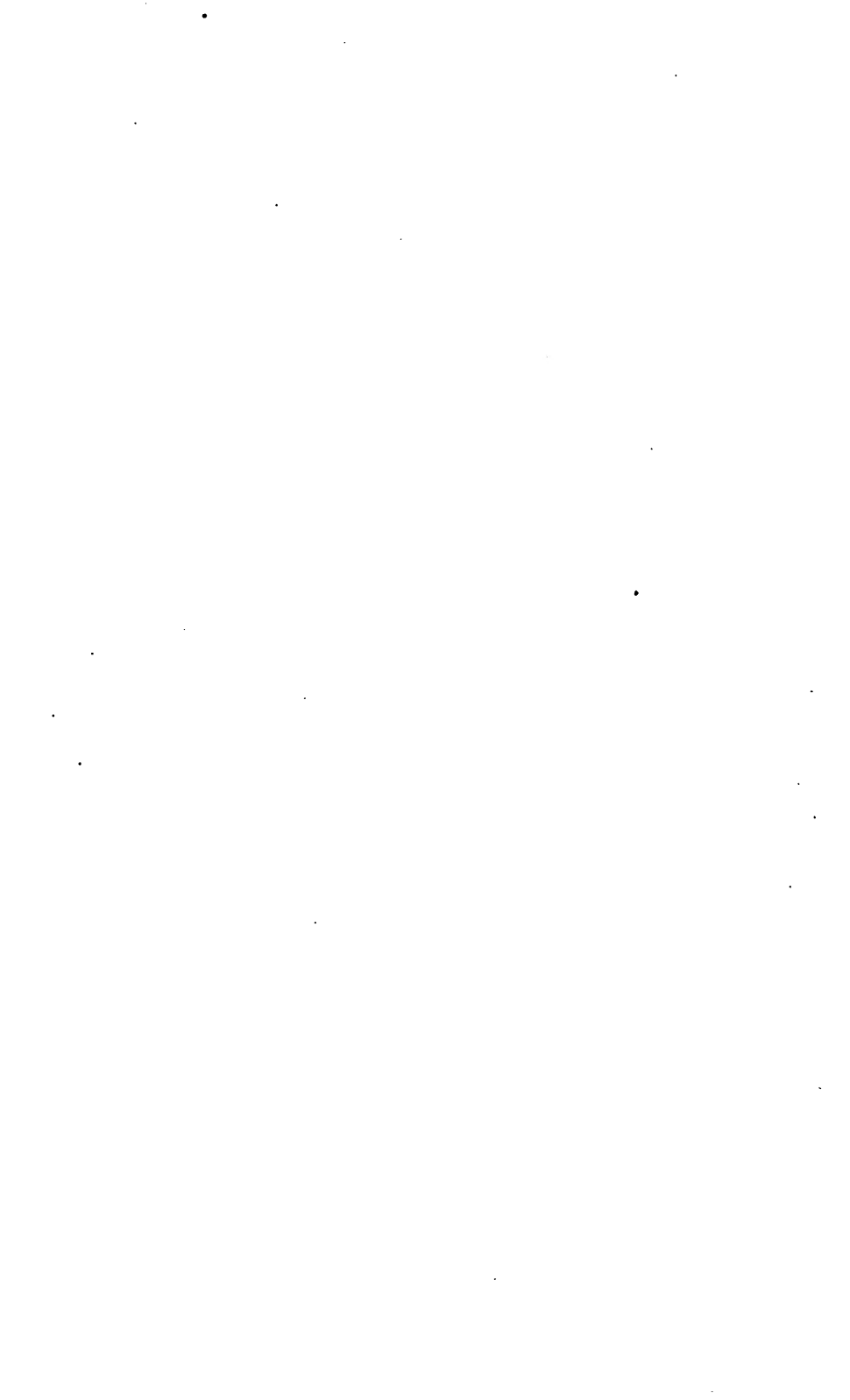


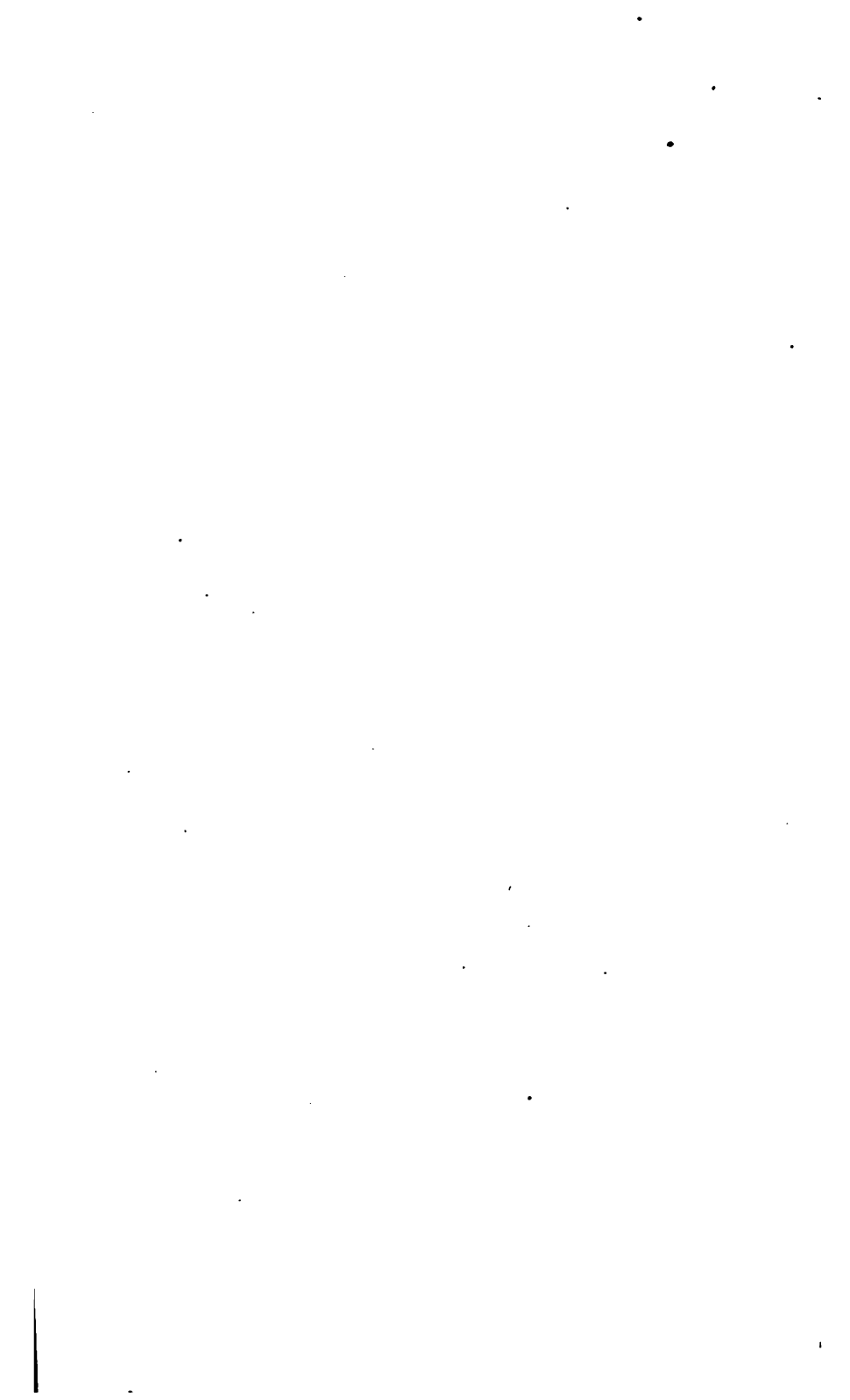
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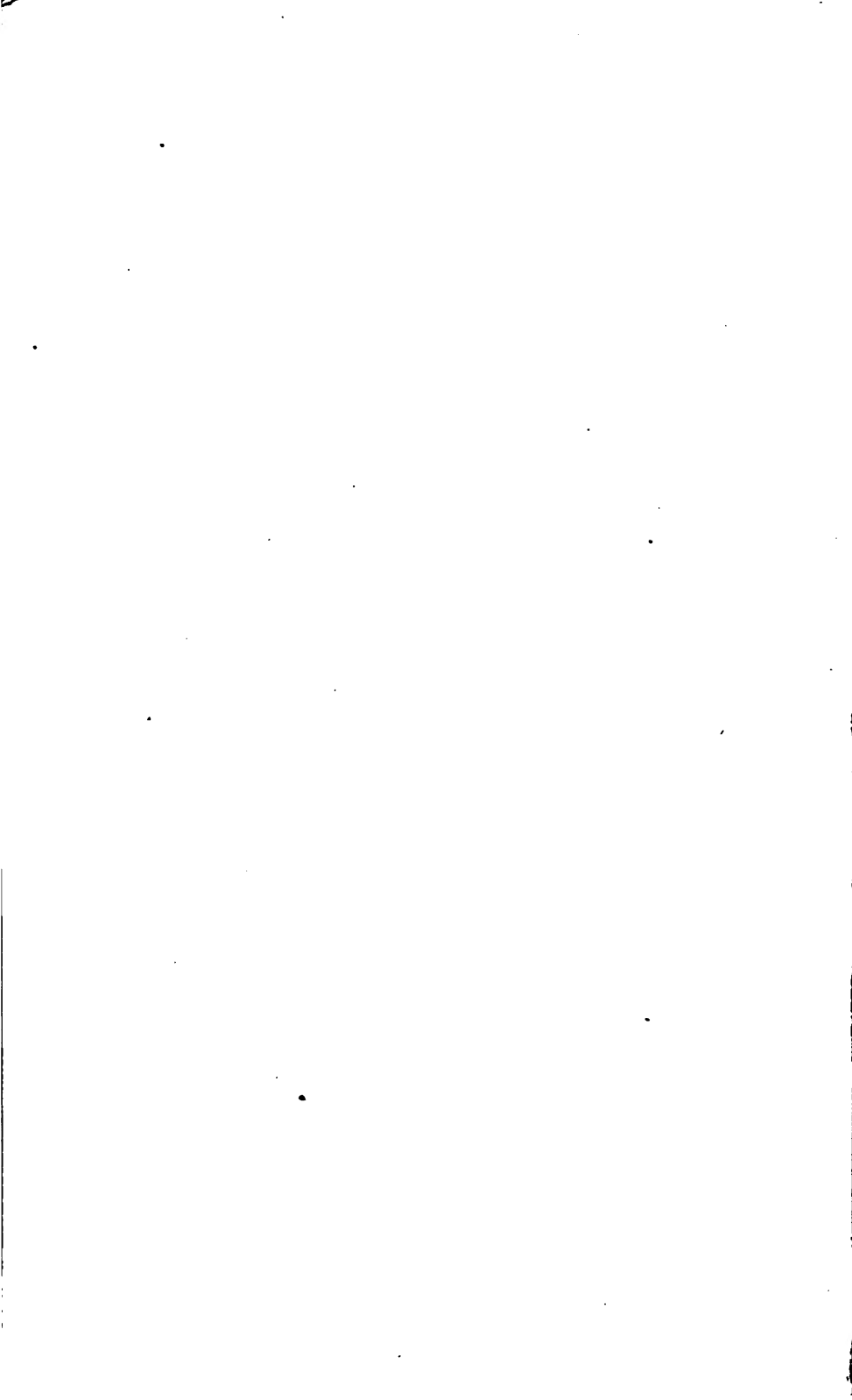
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 29
WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

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JUSTICES OF THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

HON. SILAS W. SANDERSON.....CHIEF JUSTICE.

HON. JOHN CURREY.....

HON. LORENZO SAWYER.....

HON. AUGUSTUS L. RHODES...

HON. OSCAR L. SHAFTER, LL. D. }

ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

CHARLES A. TUTTLE, Esq.....REPORTER.

J. G. McCULLOUGH, Esq.....ATTORNEY-GENERAL.

W. D. HARRIMAN, Esq.....CLERK.

NOTE.—The Hon. SILAS W. SANDERSON's term of office expired on the last day of of eighteen hundred and sixty-five. At the judicial election held in the fall of eighteen hundred and sixty-five, he was re-elected for the term of ten years, commencing January first, eighteen hundred and sixty-six, on which day the Hon. JOHN CURREY became Chief Justice.

DISTRICT JUDGES.

FIRST DISTRICT.....	PABLO DE LA GUERRA.
SECOND DISTRICT.....	W. T. SEXTON.
THIRD DISTRICT.....	S. B. McKEE.
FOURTH DISTRICT.....	E. D. SAWYER.
FIFTH DISTRICT.....	JOSEPH M. CAVIS.
SIXTH DISTRICT.....	J. H. McKUNE.
SEVENTH DISTRICT.....	J. B. SOUTHARD.
EIGHTH DISTRICT.....	WILLIAM R. TURNER.
NINTH DISTRICT.....	E. GARTER.
TENTH DISTRICT.....	I. S. BELCHER.
ELEVENTH DISTRICT.....	S. W. BROCKWAY.
TWELFTH DISTRICT.....	O. C. PRATT.
THIRTEENTH DISTRICT.....	ALEXANDER DEERING.
FOURTEENTH DISTRICT.....	T. B. McFARLAND.
FIFTEENTH DISTRICT.....	S. H. DWINELLE.
SIXTEENTH DISTRICT.....	THERON REED.

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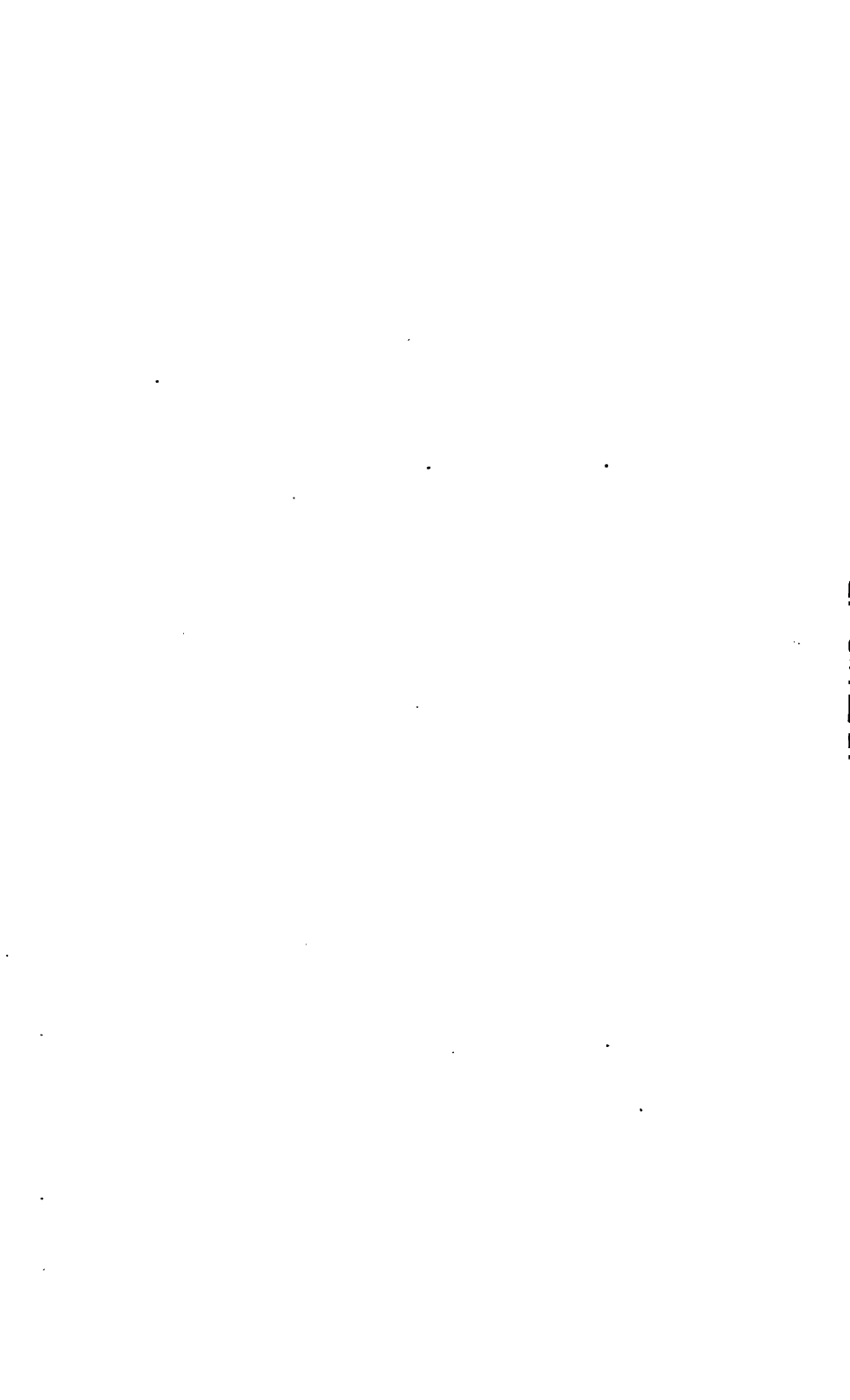
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OCTOBER TERM, 1865.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OCTOBER TERM, 1865.

MARIA T. P. DE CASTRO *v.* JEREMIAH CLARKE *et als.*

ACTION ON UNDERTAKING TO STAY WRIT OF RESTITUTION PENDING AN APPEAL.

— In an action on an undertaking executed by and on behalf of the defendants in a judgment in ejectment, conditioned to pay the value of the use and occupation of the premises pending the appeal, an answer setting up that pending the appeal the plaintiff conveyed a part of the premises to one or more of the defendants in the judgment, and ' ' leased portions to other parties, does not state facts sufficient to constitute a defense.

IDEM.— Such answer failing to show when the conveyance was made, it will be deemed not to have been made until the last day the appeal was pending.

IDEM.— Such answer is also defective in not stating that the use and occupation of the portions of the premises conveyed and leased was of any value.

RIGHT OF ACTION ON UNDERTAKING TO STAY WRIT OF RESTITUTION.— A right of action on an undertaking executed to stay a writ of restitution pending an appeal from a judgment in ejectment accrues upon the affirmance of the judgment, though the liability of the obligors may continue until the appellants deliver possession of the premises recovered.

RECOVERY ON UNDERTAKING TO STAY WRIT OF RESTITUTION.— The plaintiff in a judgment in ejectment in an action on an undertaking to stay a writ of restitution pending an appeal, can recover the value of the use of whatever part of the premises the defendants occupied, if the judgment is affirmed.

Argument for Appellants.

SURETIES ON UNDERTAKING TO STAY WRIT OF RESTITUTION.— If, pending an appeal from a judgment for plaintiff in ejectment, the plaintiff sells or leases a part of the premises recovered, the sureties on an undertaking to stay a writ of restitution pending the appeal are not released from their liability on the same.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

J. Clarke, for Appellants.

The undertaking being to the effect that the defendants in the ejectment would “pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding four thousand dollars,” as required by section five hundred and fifty-two of the Practice Act, any payment of rent of any part of the premises during said period was a discharge *pro tanto* of said undertaking, for the reason that as far as it went it was the doing by said defendants of the very thing which the obligors in the bond stipulated and promised that they should do. (*Turpey v. Shellenberger*, 10 Cal. 390; *People v. Buster*, 11 Cal. 15.)

The sale and lease of portions of the premises pending the appeal operated as a total release of the sureties on the appeal bond, because the plaintiff thereby parted with a security to which the sureties were entitled upon the payment of the amount due on the bond. The sale of the entire premises would of course have carried with it the right to the rents and profits from the date of the sale, and also to the security held by the plaintiff for the payment thereof; that is, to the bond in question. Of course, a sale of part of the premises would be an assignment *pro tanto* of the bond. Now it is certainly competent for the sureties, upon tendering the amount due on the bond, to demand an assignment of the latter to themselves, (or rather to their trustee,) so as to force payment of it out of their principals. But the plaintiff has voluntarily put it out of his power to assign the bond, because in selling

Opinion of the Court — Currey, J.

to Ringstorff, and the successors in interest of the two Rices, neither of whom was on the bond, and only one defendant in the ejectment, plaintiff equitably assigned the bond *pro tanto* to them, and thereby put it out of his power to assign the same for the benefit of the sureties.

The new contracts touching the occupation of land (the leases and sales) *ipso facto* discharged the sureties. "If the original contract is altered in any material point, so as to constitute a new agreement varying substantially from the former, the surety is no longer bound." (Addison on Contracts, 444.)

S. O. Houghton, for Respondent.

It is insisted by counsel that the judgment should be reversed by reason of the error committed by the Court below in sustaining the demurrer to the second count in the answer. The defendants were not prejudiced by the action of the Court in that respect, for if the matters set up in the second count were sufficient to constitute a defense, the defendants had the benefit of the proof of those facts, as they were all proved by the counsel for defendants on the cross-examination of plaintiff's witness, without objection by the plaintiff. The defendants therefore had the benefit of that defense just as fully as though the demurrer thereto had been overruled.

By the Court, CURREY, J.

The plaintiff sued the defendants—nine in number—upon an undertaking bearing date the 19th of June, 1863, by which they jointly and severally undertook and promised that if the judgment rendered in the District Court of the Third Judicial District in and for the County of Santa Clara, in the action of *De Castro v. Richardson and others*, should be affirmed on appeal by the Supreme Court, the appellants therein would pay the value of the use and occupation of the premises recovered in that action from the date of said undertaking until the possession of the premises should be delivered pursuant to such judgment. The undertaking of the defendants

was limited to four thousand dollars. Six of the defendants in this action were appellants in the case of Richardson. The other defendants herein were their sureties in the undertaking on which this action was brought. The judgment in Richardson's case was affirmed by the Supreme Court (25 Cal. 49,) but by reason of the appeal execution on the judgment was stayed from the 19th of June, 1863, to the 9th of September, 1864; after which this action was commenced to recover four thousand dollars for the use and occupation of the premises pending the appeal.

The defendants answered, denying each and every allegation of the complaint; and for a special defense they answered that pending the appeal the plaintiff conveyed by deed a large portion of the premises described to Henry Ringstorff, one of the defendants in the judgment mentioned in the complaint. That during the same period "the interest and estate of the plaintiff in another large portion of the premises came by adverse mesne conveyances to the assigns and successors in interest of Charles Rice and Minerva Rice, defendants in the same judgment;" and that during the same period the "plaintiff leased divers large portions of said premises respectively to Caleb B. Crews, Matthew W. Dixon and Andrew Whisman, for terms then commenced and not yet expired." The defendants then averred that by reason thereof, the plaintiff did not and could not take possession of the premises under the judgment affirmed. To this special defense the plaintiff demurred, on the ground that facts therein set forth were insufficient to constitute a defense to the action on the undertaking, and the District Court being of that opinion sustained the demurrer. The cause was then tried by the Court without a jury. A witness was examined respecting the value of the use and occupation of the premises by the defendants in the Richardson case, pending the appeal therein. From the evidence in the case the Court found that fourteen of the defendants in the Richardson case, and those who entered upon the property under them, continued in the occupation of the premises described from the 19th of June, 1863, to the 1st of July,

1864, and that three of the same defendants continued in the occupation of a portion of the premises until the 1st of October, 1864, and that the value of the rents and profits of the portions of the premises so occupied by the defendants in that case, pending the appeal therein, until the possession of the same was surrendered by them, was six thousand nine hundred and fifty-eight dollars. The Court thereupon rendered judgment for the plaintiff against the defendants for the sum of four thousand dollars and the costs of the action. From this judgment and from an order denying a motion for a new trial the defendants appealed.

The errors assigned and for which the defendants maintain the judgment should be reversed, need not to be examined separately, because they can as well be disposed of in reviewing the action of the Court in sustaining the plaintiff's demurrer to the special answer of the defendants.

The effect of the ruling of the Court sustaining the demurrer was that the matters interposed as an affirmative defense were, though admitted to be true, insufficient to constitute any defense to the plaintiff's alleged cause of action. The facts stated as an affirmative defense are that at some time pending the case of Richardson in the Supreme Court, the plaintiff sold and conveyed by deed a portion of the premises, with the right of immediate possession thereof, to Henry Ringstorff; and also that plaintiff leased divers large portions of the same premises to several persons named, for terms commenced and not expired when the answer in this action was filed.

Defective answer in an action on an undertaking given to stay a writ of restitution pending an appeal.

It does not appear from the answer at what time, pending the appeal, the deed of conveyance and the leases mentioned were made. They may have been made on the last day the appeal was pending; and if it be assumed that the execution of these transfers could have operated to defeat the plaintiff's right to a recovery in part, as possibly might have been the case had they been made sufficiently early pending the appeal,

it cannot, in the absence of an averment, be assumed that they were made thus early, or at any time sufficiently early to prevent accruing to the plaintiff the right to the value of the use and occupation of the premises for all that period save the last day.

It is to be presumed the party pleading will state the case as favorably for himself as a strict adherence to the truth will permit, and hence the rule is that a pleading is to be taken most strongly against the party making it. Applying this rule to the case in hand, we must hold the special answer to amount only to an averment that the conveyance and leases mentioned were made on the last day the appeal in the Richardson case was pending in the Supreme Court. (*Green v. Covillaud*, 10 Cal. 322, 324.)

The special answer does not state that the use and occupation of the portions of the premises conveyed and leased were of any value after such transfers were made, nor of what value, if of any value whatever. This should have appeared in order to have entitled the defendants upon their theory to a credit upon their obligation to its full extent, or to the amount of such value, if less than four thousand dollars.

Liability of sureties on an undertaking given to stay a writ of restitution pending an appeal.

The defendants insist that as the plaintiff had conveyed a portion of the premises by deed absolute, pending the appeal, it became impossible for the time to arrive when the defendants could become liable on their undertaking; for the reason that their obligation was to pay, in case the judgment was affirmed, "the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment," not exceeding however the sum specified in the undertaking. The term specified was limited by two events. The taking of the appeal was one, and the delivery of the possession pursuant to the judgment was the other. The defendants' promise and undertaking was that the appellants named in the undertaking on appeal would

pay for the use and occupation of the property for that period and no longer. The delivery of the possession of the premises to the plaintiff, pursuant to the judgment recovered and affirmed, was not a condition precedent to her right to maintain her action. The affirmance of the judgment by the Supreme Court was the condition on which the defendant's liability became absolute, though its extent in such a case might not be limited by that event; because they bound themselves that the appellants would pay the value of the use and occupation of the property, pending the appeal, and until the delivery of the possession thereof pursuant to the judgment—that is, until its delivery to the party entitled to the possession of it, as determined by the judgment. The plaintiff was entitled to the value of the use and occupation of the property held and enjoyed by the appellants in the Richardson case adversely to her, pending their appeal, whether it was the whole or only a part of the premises, and to recover such value to the extent of four thousand dollars, if it amounted to so much, in an action founded on the undertaking in question.

The defendants, who were sureties for the appellants in the case of Richardson, contend that the sale and lease of portions of the premises pending the appeal, operated as an entire release of the sureties, because they say the plaintiff thereby parted with a security to which the sureties were entitled upon the payment of the amount due on the undertaking. We think it would be impossible to discover any valid ground on which to support this position. What was the security which the plaintiff held for the use and occupation of the property? It was not the land, for that belonged to the plaintiff. It cannot be said that by conveying a portion of the land, and leasing another portion of it, the plaintiff parted with a security to which the sureties would either at law or in equity be entitled were they to pay the amount due for the use and occupation of the property while she was entitled to its possession, for the reason that the land did not belong to the appellants named in the undertaking, nor were they enti-

Opinion of the Court — Currey, J.

tled to its use and occupation. If the appellants mentioned in the undertaking had pledged to the plaintiff property of any kind as an additional security for the payment to her of whatever might be ascertained to be the value of the use and occupation of the land pending the appeal, it may be admitted the sureties would, upon payment of the amount for which they had become liable by their undertaking, be entitled, for their indemnity, to an assignment or transfer of such additional security. But there is nothing in this case that would authorize an application of the principle which entitles a surety, upon payment, to an assignment or transfer of the securities of the principal obligor, or debtor, in the hands of the obligee, or creditor.

In our judgment the demurrer to the special answer of the defendants was properly sustained.

Judgment affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

THOMAS HOPPER v. W. HENRY JONES.

ABSOLUTE DEED GIVEN AS A MORTGAGE.—A clear case ought to be made to justify a jury or a Court in finding upon parol testimony that a deed absolute on its face is a mortgage.

PAROL TESTIMONY.—Parol testimony is admissible to show that a deed absolute on its face is a mortgage.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

Plaintiff recovered judgment, and defendant appealed.
The other facts are stated in the opinion of the Court.

W. Henry Jones, in *pro per.*, for Appellant.

George Pearce, for Respondent.

By the Court, SAWYER, J.

This is an action to recover lands in Petaluma. The plaintiff relies on a conveyance from defendant. And the defendant sets up that although absolute upon its face, the deed of conveyance was intended to be a mortgage to secure money due from defendant to plaintiff. Upon this point the evidence was conflicting, the plaintiff testifying one way, and the defendant the other, and the testimony of the other witnesses is not absolutely inconsistent with either. The question was fairly submitted to the jury, and determined against the appellant. The evidence being conflicting, we cannot, under the rule established by former decisions, disturb the verdict. Besides, if it were submitted to us as an original question, we are not sure that we should not feel called upon to render a similar verdict. A clear case ought to be made to justify a jury or Court in finding upon parol testimony a deed absolute upon its face to be a mortgage.

The parol testimony, tending to show that the deed was designed to be a mortgage, was properly admitted; otherwise section two hundred sixty of the Practice Act would be nugatory. We have in this State but one rule of evidence, which is applicable alike to all cases, whether at law or in equity. (*Cunningham v. Hawkins*, 27 Cal. 606.)

Judgment affirmed.

ALEXANDER BOYD v. H. G. BLANKMAN.

HEIR RETAINS AN ASSIGNABLE INTEREST IN LAND BOUGHT BY ADMINISTRATOR AT HIS OWN SALE.—If the administrator of an estate makes a sale of land belonging to the estate, under an order of the Probate Court procured by him, and at the sale becomes the purchaser through another person, who takes and holds the legal title in trust for the administrator, and afterwards conveys it to him, the heir retains such an equitable interest in the land as is assignable, and the assignee may maintain an action against the administrator to enforce a trust.

ADMINISTRATOR BUYING AT HIS OWN SALE IS TRUSTEE FOR HEIR.—If an administrator becomes a purchaser, through another person, of land of the estate sold by him under an order of the Probate Court, the heir retains the equitable title, and his deed conveys such equitable title, while the legal title is vested in the administrator who holds it in trust.

Points decided.

SAME.—In such case the deed of the heir conveys the equitable title, and his deed is evidence of his intention to disaffirm the sale.

NOT NECESSARY FOR *Cestui Que Trust* TO DISAFFIRM TRUSTEES PURCHASE OF TRUST ESTATE.—Where an administrator at his own sale becomes the purchaser through another person of land of the estate, there are strong reasons for holding that the relation of trustee and *cestui que trust* is not by the fact of the sale shifted from the land to the proceeds of the sale, but that the administrator remains a trustee as to the land until the heir affirms the sale.

PURCHASE BY ADMINISTRATOR AT HIS OWN SALE NOT VOID.—If an administrator at his own sale, made under an order of the Probate Court, buys the land of the estate through another person, the sale is not void, but only voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee.

ORDERS OF PROBATE COURT.—If the Probate Court, in a matter where it has jurisdiction, makes an order upon insufficient evidence, or contrary to the evidence, the order cannot on that ground be attacked in a collateral proceeding.

ORDER OF PROBATE COURT TO SELL REAL ESTATE.—If an administrator procures an order of the Probate Court for the sale of real estate to pay a debt which the administrator had previously paid with funds of the estate, it is not a fraud which will enable the order to be attacked in a collateral proceeding.

SAME.—An order of a Probate Court to sell all the real estate of an intestate to pay debts, when the sale of a small portion would have been sufficient, cannot for this reason be set aside in a collateral proceeding.

IGNORANCE AS A GROUND FOR RELIEF IN EQUITY.—The fact that a person is unlearned and ignorant of legal proceedings affords no ground of relief in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and such person misrepresented the state of facts.

STATUTE OF LIMITATIONS.—The Statute of Limitations is applicable alike to causes of action in equity and at law.

PLEADINGS IN ACTION FOR RELIEF ON GROUND OF FRAUD.—When the cause of action stated in the complaint is for relief on the ground of fraud, and is stated to have accrued more than three years before the commencement of the action, the complaint should also aver that the acts constituting the fraud had been discovered within three years; but if the replication contains this averment, and this issue is tried without objection, the irregularity in the manner of presenting the issue will be disregarded.

PLEADING STATUTE OF LIMITATIONS.—A defendant relying on the Statute of Limitations should not allege matter of law, but the facts which bring him within the statute.

ANSWER SETTING UP STATUTE OF LIMITATIONS.—An answer stating that the cause of action has not accrued within five years, is sufficient for five years; and for any period of limitation named in the statute, less than five years.

CONSTRUCTIVE FRAUD—STATUTE OF LIMITATIONS.—The clause in the seventeenth section of the Statute of Limitations, providing that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud, is applicable to constructive fraud as well as fraud in fact.

Statement of Facts.

LIMITATION OF TIME FOR RELIEF ON GROUND OF FRAUD.—An Action for relief on the ground of fraud may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Jack Hina died at the City of San Francisco, intestate, on the 3d day of October, 1850, leaving Mary Hina, his widow, him surviving, his sole heir.

The said Mary Hina, and the defendant Henry G. Blankman, were appointed administrators of the estate of said Jack Hina, deceased, and duly qualified as such, and took upon themselves the duties of such administrators.

The property and assets of such estate were the lands and premises described in the complaint, being fifty-vara lot Number Two Hundred and Eighty-Two on the official map of San Francisco; and there came to the hands of the defendant, as administrator, the sum of eight hundred and ninety dollars in cash, and there was other personal estate of the value of about two hundred dollars.

Said lands and premises were subject to an incumbrance, by way of mortgage, in the sum of seven hundred dollars, executed by said Jack Hina in his lifetime, bearing interest at the rate of ten per cent per month, on which interest was paid by Jack Hina in his lifetime, to the 24th of August, 1850.

On the 16th day of December, 1850, the defendant, as administrator, presented a petition to the Probate Court for the sale of said lands and premises to pay said mortgage debt and expenses of administration, in which petition the said Mary Hina, co-administrator, was not joined.

The only debt or claim against the said estate, excepting the costs and expenses of administration, was the said mortgage debt.

On the 24th day of December, 1850, and while the proceedings for a sale were pending in the Probate Court, the defendant Blankman paid the amount due on said mortgage to the mortgagee, and procured and caused the said mortgage to be

Statement of Facts.

assigned to one Joseph B. Bidleman for his, the said Blankman's benefit.

Said Blankman continued to prosecute said application before the Probate Court for a sale of said premises, and obtained an order for such sale, and on the 15th day of February, 1851, said premises were put up for sale at public auction, and struck off to one William A. A. Reis, as the purchaser, at the price and sum of fourteen hundred and fifty dollars, and a conveyance was made by said Blankman, as administrator, to said Reis, but in fact for the benefit of the defendant Blankman, and no money was in fact paid by said Reis on such sale and purchase.

On the 10th day of April, 1851, the said Reis conveyed the said lands and premises to said Joseph B. Bidleman, who took said conveyance and held said lands thereunder in trust and for the benefit of said Blankman.

On the 19th day of February, 1851, the said Blankman caused an action to be commenced in the name of the said Joseph B. Bidleman, as plaintiff, in the District Court of the Fourth Judicial District, wherein said Blankman, as administrator, and said Reis, were made defendants, and were the only defendants, for the purpose of foreclosing said mortgage and selling said premises. A judgment and decree was rendered in said action by and with the written consent of the defendants therein, for the foreclosure and sale of said premises, and on the 31st day of March, 1851, said premises were put up for sale under said decree, and struck off to said Joseph B. Bidleman, as the purchaser, for the sum of eight hundred and fifty-eight dollars, but in fact for the benefit of said defendant Blankman; and on the first day of April, 1851, the Sheriff executed a deed to said J. B. Bidleman, as such purchaser, who took the same in trust and for the benefit of said Blankman.

Afterward, and in the month of April, 1851, the said Blankman caused an action to be commenced and prosecuted in the District Court of the Fourth District, in the name of said Bidleman, as plaintiff, but for the benefit of said Blankman,

Statement of Facts.

and against the said Mary Hina, as defendant, to recover possession of said lands and premises, and such proceedings were had that judgment was recovered in favor of the plaintiff therein for the possession of said premises; a writ of execution was issued on said judgment, and was executed on the 12th day of June, 1851, by removing said Mary Hina from the premises, and putting said Bidleman in possession thereof.

On the 20th day of December, 1851, the said J. B. Bidleman made, executed, and delivered to said Blankman a deed of conveyance of said premises, which conveyance was therein expressed to be for the consideration of fifteen hundred dollars, but no consideration was in fact paid, or agreed to be paid; and such conveyance was made at the request of said Blankman, and without any consideration, which said conveyance was acknowledged and duly recorded in the office of the Recorder of the County of San Francisco, on the 3d day of January, 1852.

Said Mary Hina left and removed from the City and County of San Francisco about the month of June, 1851, and after she was removed from the premises under the aforesaid writ of execution, and has ever since resided in the County of El Dorado, in this State, more than one hundred and fifty miles from the City of San Francisco, and never returned to the said city and county till after the commencement of this action.

On the 18th day of April, 1851, the said Blankman rendered his final account and was discharged by the order of the Probate Court from his office as administrator of said estate.

On the 28th day of February, 1861, the said Mary Hina sold, assigned, transferred and conveyed to the plaintiff the said lands and premises, and all her rights and interests therein and her claim thereto, and to the rents during the time the said Blankman has held and enjoyed the same.

In 1861, just before the commencement of the action, Bidleman first informed Mary Hina that he purchased the property in trust for Blankman, and at Blankman's request, and paid no consideration for it. Blankman had never given her this information.

Argument for Appellant.

The Court below found that there was no fraud in fact, and also found that the knowledge that the purchase and sale of the property at the probate and foreclosure sales were made in trust for the defendant Blankman, came to the knowledge of Mary Hina more than five years before the commencement of the action.

The action was commenced in March, 1861. The Court below rendered a judgment for defendant, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Doyle & Barber, and *Delos Lake*, for Appellant.

Blankman, in selling the property of Hina's estate under the order of the Probate Court, was acting as a trustee for the heir, Mary Hina. *Davoue v. Fanning*, 2 J. C. 256; *Baker v. Whiting*, 2 Sumn. 481; *Van Horne v. Fonda*, 5 J. C. 409.)

The sale by himself to himself, being in violation of his duty as trustee, did not discharge the trust, and he still continued a trustee of the legal estate for Mary Hina's benefit, subject to her right to affirm or disaffirm the sale, which right was incident to the equitable estate or trust in the property which she still possessed.

To the point that a trustee purchasing at his own sale remains a trustee, see *Fox v. Mackreth*, 1 White & Tudor L. C. 79, 109, 101, 123; *Rogers v. Rogers*, 1 Hopkins, 524; *Brown v. Lynch*, 1 Paige, 147; *Drysdale's Appeal*, 2 Harris, 537; *Jenkins v. Eldridge*, 3 Story, 290; *Davoue v. Fanning*, 2 J. C. 262; 2 Spence Eq. Juris. 256.

That no act of the trustee shall prejudice the equitable estate of the *cestui que trust*, see 1 Cruise's Dig. 449, §9; Id. 397, §66; Story Eq. Juris. §1,261; 2 Spence Eq. Juris. 876.

This trust or equitable estate in Mary Hina would, in the natural course of events, have descended to her heirs. (1 Cruise's Dig. 407, §9; *Dobson v. Racey*, 3 Sandf. Ch. 61; *Campbell v. Johnson*, 1 Id. 148; *Ward v. Smith*, 3 Id. 592; *Evertson v. Tappen*, 5 J. C. 497, 513.)

Argument for Appellant.

It therefore passed to the plaintiff under and by virtue of the conveyances set forth in the transcript. (1 Cruise's Dig. 407, §8; Id. 405-6, §§1-4; Lewin on Trusts, 498, 655; *Quinn v. Moore*, 15 N. Y. 433; *Daker v. Whiting*, 3 Sumn. 477, 480, 482, 484, which is precisely in point.

Blankman could derive no equitable title through a purchase fraudulent in law, and in direct contravention of the statute. (Story's Eq. Juris. §§1,264, 1,265.) It is claimed that the equitable estate must have been in Blankman, because he could have conveyed a good title, legal and equitable, to a *bona fide* purchaser. But the trustee of the legal estate can always do this. (1 Cruise Dig. 449, §10.) So a thief who has no property in goods can vest a good title in the purchaser, according to the English law, by sale at market overt. Other illustrations might be drawn from the law of negotiable securities, bills of lading, etc.

The provision of the Statute of Limitations applicable to this case is contained in the seventeenth section of the Act, which prescribes three years as the limitation of an action for relief on the ground of fraud, the cause of action not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The one hundred and ninetieth section of the Probate Act refers to sales made in good faith by the administrator to a third party, which, owing to some irregularity in the proceedings, pass no title. The object of this provision is to secure the title of the purchaser under such sales after the lapse of three years. But suppose the administrator had fraudulently sold to a fraudulent purchaser a part of the decedent's estate, and that the heir had filed a bill against the purchaser to set aside the conveyance on the ground of fraud, can it be doubted that the seventeenth section of the Statute of Limitations would apply to the case? And if it would apply to a suit against the purchaser from the administrator, why not to a suit against the administrator himself when he becomes the purchaser?

Argument for Respondent.

Section one hundred and eighty-nine, if it appears to a case like the present, merely furnishes the heir with a cumulative remedy. Can any reason be suggested why the Legislature, after having positively prohibited the administrator from purchasing the estate entrusted to his charge, should permit him to retain his purchase undisturbed, if, with all the means of concealment at his command, he can cover up the transaction for the period of three years? The fraudulent purchaser of property at an administrator's sale, whether such purchaser be a third party or the administrator himself, is liable to an action for "relief on the ground of fraud" at any time within three years after the discovery of the facts constituting the fraud. If the sale by Blankman to himself was utterly void, the plaintiff is still entitled to the relief demanded. For as Blankman continued after the sale to hold the property subject to the trust, being still the trustee of Mary Hina, the *cestui que trust*, the plaintiff is entitled to have that trust declared, to an account of the rents and profits, and to a surrender of possession. (2 Washburn Real Prop., p. 210, §18; Willard's Eq. Jurisprudence, 48; *Mohawk Bank v. Atwater*, 2 Barb. Ch. 62.)

Supposing the sale void, the Statute of Limitations never began to run, as against Mary Hina, until 1861, because Blankman never disclosed to her, nor did she ever learn, nor was she chargeable with notice of the fact until then, that he had himself purchased the property, or that he claimed possession by virtue of such purchase. (Tiffany & Bullard on Trustees, 715; *Way v. Cutting*, 20 N. H. 188, *West v. Sloan*, 3 Jones' Eq. N. C. 103; *Randall v. Errington*, 10 Vesey, 428; 1 White & Tudor, L. C. 136, 117; *Painter v. Henderson*, 7 Barr. 50.

E. W. F. Sloan, for Respondent.

A purchase by trustee, whether in his own name or in the name of another, is not, *per se*, fraudulent. (*Campbell v. Walker*, 5 Ves. 678, 680, 681; *Whichcote v. Lawrence*, 3 Ves. Jr. 750; *Prevost v. Gratz*, 1 Pet. C. C. R. 368; *S. C. on*

Argument for Respondent.

Appeal, 6 Wheat. 481; *Van Epps v. Van Epps*, 9 Paige, 240; *Davoue v. Fanning*, 2 J. Ch. R. 268; *Famour v. Brooks*, 9 Pick. R. 202; *Jackson v. Woolsey*, 11 J. R. 455; 1 Story's Eq. Jur., Secs. 321, 322, 1,261, 1,262.)

In *Michaud v. Girod*, 4 How. U. S. 568, cited by appellant, there are some unguarded expressions in the opinion of the Court, as delivered by Mr. Justice Wayne, to the effect that such a purchase is, *per se*, fraudulent and void. It will be observed, however, that there was evidence of a sinister intent—of fraud, in fact—in that case. The dictum, “that the purchase by a trustee carries fraud on the face of it,” never was a rule in equity. The assumption is contradicted by every authority cited in the opinion. In *Prevost v. Gratz*, 1 Pet. C. C. R. 368, Mr. Justice Washington says:

“The trustee can never purchase or hold the property discharged of the equity of the *cestui que trust* to call upon him, in a reasonable time, to account for the profit or to have a resale. The purchase, however, by the trustee, is not absolutely void, but voidable at the election of the *cestui que trust*, if he is dissatisfied with it, and in a reasonable time after a knowledge of the fact impeaches its validity.”

The case of *Mackreth v. Fox*, 2 Bro. C. R. 410, is referred to, but sustains no such proposition. The language of the note at the foot of page 410, and which was particularly cited, is that “Mackreth lost the character of trustee when he became a purchaser of the estate.”

The doctrine is clearly stated by the Master of the Rolls, in *Campbell v. Walker*, 5 Ves. 60, where he said:

“I take the result of the evidence in this case to be that this was a *bona fide* sale, liable to be impeached only from the circumstance that the purchasers were trustees, and then it is a very important question.

“Plaintiffs insist that according to the principle which has prevailed in these cases, the *cestui que trust* has a right to put an end to this sale; and I am of opinion the rule of the Court goes to this extent.

“I will lay down the rule as broad as this, and I wish trus-

Argument for Respondent.

tees to understand it, that any trustee purchasing the estate is liable to have his purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say he is not satisfied with it.

"The trustee purchases subject to that equity, that if the *cestui que trust* come in a reasonable time, they may call to have the estate resold.

"They must buy with that clog.

"I perfectly agree with the Lord Chancellor, in *Whichcote v. Lawrence*, 3 Ves. 740, it was a perversion of the rule to say no trustee should buy. There never was such a rule."

I think it must be regarded as well established law, that a purchase by the trustee is not necessarily fraudulent in fact, and that the right of the *cestui que trust* to put an end to the sale by bill in equity is not assignable. Upon the supposition, however, that by the conveyance from Mary Hina to appellant, the latter became vested with all her rights, both legal and equitable, the Statute of Limitations would, nevertheless, interpose an immovable barrier against any recovery.

The first aspect of the case, as presented by the bill, is that of fraud in fact. Assuming the charge to be true for the sake of the argument, the seventeenth section of the Statute of Limitations expressly applies; and the lapse of three years from the date of the "discovery by the aggrieved party of the facts constituting the fraud," constitutes a bar. The application of the statute in this State to suits in equity is not left to the discretion of the Court. When, by its own express terms, the Statute of Limitations is made applicable alike to actions at law and to suits in equity, its provisions are equally imperative in both. (*Farnam v. Brooks*, 9 Pick. 242; *Johnson v. Ames*, 11 Id. 182; *Bacon et al. v. Howard*, 20 How. 25; *Lord v. Norris*, 18 Cal. 487.)

Touching the second ground of relief, however, it is said by appellant's counsel that, as between trustee and *cestui que trust*, the Statute of Limitations does not apply. It is admitted that where there is an express passive trust, where the trustee holds the legal title to the use of another without any action on his part, or he is to execute the trust by collecting and

applying the rents, or by a conveyance of the legal estate to some particular person, as a general rule the statute cannot run.

Again, where the trust is to be executed by a sale of the land to the highest bidder, there can be, as a general rule, no adverse holding until after a sale and conveyance actually takes place.

By a sale, however, the trust, being executed, is, as to the land itself, extinguished, and attaches to the proceeds until they are paid over, or otherwise properly applied or accounted for. If the trustee becomes directly or indirectly the purchaser, the *cestui que trust* cannot pursue the lands and proceeds of the sale both. He can charge the trustee as to either, at his election. From the time of the purchase by the trustee, however, he becomes an adverse holder. Such assertion of an adverse title on his part is an open, unequivocal repudiation of the trust. But unless the *cestui* chooses to abide by the sale, he can come into equity and demand a resale of the land, or where it is practicable, refund the proceeds and claim a conveyance. A right of action has then accrued to him, against which the Statute of Limitations will commence running. The doctrine that the statute does not run against the *cestui que trust* is founded on the ground that the possession by the trustee is not inconsistent with his right and interest, and does not apply where the trustee actually holds adversely. (*Boone v. Chiles*, 10 Pet. 223; *Avery v. Holland*, 2 Overton, 71; *Wilson v. Watkins*, 3 Pet. 51, 52.)

A purchase by the trustee, Sheriff, or other party charged with the sale of property, is not, *per se*, fraudulent in fact. So held in *Dobson v. Racey*, 3 Sandf. C. R. 63, where it is said, "The law declares the sale unwarrantable on grounds of public policy, irrespective of any proof of injury or intentional wrong." In *Ward v. Smith*, Id. 597, where the administrator had purchased at a sale under the Surrogate's order, it was admitted by the Vice Chancellor that there was no evidence of intentional fraud, holding that the deed was not void, but voidable at the instance of the heirs. In *Van Epps v. Van*

Epps, 9 Paige, 241, 242, it is said, that "In cases of this kind, the Court does not suffer itself to be drawn aside from the application of the equitable rule by any attempt on the part of the purchaser to establish the fairness of the purchase." In *Torry v. Bank of Orleans*, 9 Paige, 664, the Chancellor remarked, that "Whether Lot No. 182 was or was not worth more than the amount of the agent's bid, is a matter of fact which is never inquired into in such cases;" declaring that the sale is to be set aside in all cases if application be made in due time.

By the Court, RHODES, J.

This action was brought to establish and enforce a trust in favor of the plaintiff, as the grantee and assignee of Mary Hina, the heir at law of Jack Hina, deceased, as to certain premises, that the defendant purchased at his own sale as administrator; and as incidental to the relief sought in respect to the alleged trust, the plaintiff prayed for an account of the rents and profits, and for the delivery of the possession of the premises.

The mortgage executed by Jack Hina in his lifetime, which it is alleged the defendant fraudulently procured to be assigned and foreclosed, and the sale and conveyance of the premises which it is alleged were fraudulently made for the benefit of the defendant, may be dismissed from consideration except so far as those matters bear upon the question of fraud in procuring the order of sale from the Probate Court, as the legal title, which was then in Mary Hina, was unaffected by those proceedings, because she was not made a party to the foreclosure suit. The questions we shall first consider, grow out of the fact charged by the plaintiff, and found by the Court below, that the defendant, while acting as one of the administrators of Jack Hina, deceased, purchased the premises *per interpositam personam* at his own sale, which he made under the order of the Probate Court. It is alleged in the complaint that the proceedings in the Probate Court, for the purpose of procuring the sale, and the sale itself, and all pro-

ceedings connected therewith, are wholly fraudulent and void. The plaintiff's counsel, however, contends that the sale is void only at the instance of the *cestui que trust* — that is to say — that the sale is voidable. His position is that Blankman, in selling the property as administrator, acted as the trustee of the heir; that his sale to himself did not discharge the trust; that the heir, as the *cestui que trust*, possessed the right to affirm or disaffirm the sale, and that such right was incident to the equitable estate which she possessed in the property. The defendant's position is that the sale was voidable only at the election of the heir, and coupled with that, is the further position that by the sale she became divested of every assignable right or interest in the land.

Effect of purchase, by an administrator, at his own sale, made by order of the Probate Court, of land belonging to the estate.

We may say here, that we cannot assent to the latter position of the defendant. If it is admitted that anything passed by the sale, it must be conceded that the legal title passed; and after the administration is closed it would be difficult to charge the defendant as trustee in respect to the real property, unless he was vested with the legal title; but in regard to the equitable title, we are of the opinion that Mary Hina, by her deed to the plaintiff, gave evidence of her determination to disaffirm the sale; that at the time of its execution she held the equitable title as fully as before the sale, and that by her deed she conveyed such equitable title to the plaintiff. And it admits of serious doubt whether the sale, confessedly in contravention of the rules of equity, even temporarily "set afloat" her equitable interest, so that an act of disaffirmance was necessary in order to attach it again to the property. There are strong reasons for holding that upon a sale of this character, the relation of the *cestui que trust* is not, by that fact alone, shifted from the property to the proceeds of the sale, but that, in order to cut her off from any recourse upon the land, and restrict her to the proceeds, there must be either some positive act of affirmance of the sale, or such an acqui-

escence in it, manifested by the receipt of the proceeds, or by a delay beyond the period fixed by the Statute of Limitation, in commencing proceedings to set it aside, or in some other manner, that the Court will deem it equivalent to, and presumptively a ratification of the sale. By her disaffirmance, she elects to have the legal title held as it was before the sale, and have the property remain subject to all the trusts with which it was formerly charged. In the absence of a disaffirmance, that is to say, of an assertion of her interest in the land within a reasonable time, the equitable interest of the *cestui que trust* is presumed to have become united to the legal title in the hands of the trustee holding adversely to the *cestui que trust*. An illustration may be found in the case of a will, that gives to any legatee a portion of the estate of the testator, and to another legatee some of the first legatee's property. The will, of itself, does not divest the first legatee of any title to his own property, but his affirmance of the disposition made by the will, manifested by his election to take under it, is held in equity to pass his interest in what was his own property, to the second legatee; and if he relies upon his right, independent of the will, it cannot be said that he was at any time even temporarily divested of the title to his property that was attempted to be bequeathed. The right of election in the *cestui que trust* to affirm or disaffirm the sale must have for its support some interest in the premises sold. He cannot acquire the equitable title by mere assertion, nor can it with much show of reason be said, that by indicating his election to have the legal title restored to its original status, he acquires any right or title he did not possess before making the election.

Sale of the trust estate and purchase of same by the trustee who holds the legal title.

In a case where the trustee holds the legal title, and the trust is to be executed by a sale of the property for money, and the trustee becomes the purchaser, and holds in his hands the money representing the purchase money, ready to be paid over to the *cestui que trust*, the money evidently is not the

money of the *cestui que trust*, as it would be considered had the sale been properly made to a third person, and it does not become his property until he elects to affirm the sale and receive the money; and if it is true that the purchase by the trustee, divests the *cestui que trust* of his equitable interest in the land, then it follows that there is a time—the time intervening between the sale and the election by the *cestui que trust*—that he owns neither an interest in the land nor the money arising from its sale. Instead of saying, in the language of many of the cases, that the sale, as between the trustee and *cestui que trust*, is good unless the *cestui que trust* elects to avoid it, is it not more accurate to hold that the sale will become good, unless the *cestui que trust* elects to avoid it, before its ratification may be presumed from the lapse of time or other sufficient circumstances?

Is the purchase, by an administrator of the land of the estate, at his own sale, void or is it merely voidable?

Is the sale void, or is it merely voidable? The doctrine that a purchase of the trust property, by a trustee for sale, made at his own sale, whether the purchase is affected by himself or through the interposition of another person, is voidable at the election of the *cestui que trust*, is as firmly established, and is supported by as clear and satisfactory reasons, as any rule in equity. Both parties hold that it was only voidable, and yet the question is involved in much perplexity, and when tested by the rules applicable to such cases, some doubt still remains. An administrator is the creature of the statute. He has no existence independent of the statute, and in taking upon himself the duties and trusts created by it, he assumes them with all the clogs and restrictions the statute has attached to the office. Those restrictions may be other or greater than those controlling persons acting under private appointment, in a capacity very analogous to that of an administrator, but the person accepting the trust, takes it not only with the powers,

but with disabilities incident to the position. Among the restrictions is that contained in section one hundred and ninety-three of the Probate Act, that "no executor or administrator shall, directly or indirectly, purchase any property of the estate which he represents." This provision cannot be said to be in affirmance of the common law, for at law it was held that the legal title did pass by the purchase of the trustee, effected through the agency of a third person at the trustee's sale of the property, and it was only in a Court of equity that the sale was held not to pass the title. (*Jackson v. Van Dalfsen*, 5 John. 43; *Davoue v. Fanning*, 2 John. Ch. 252.) Regarding the section as creating a personal disability to take property—as depriving him of the power and capacity to receive and hold the title for any purpose, it would seem impossible to escape the conclusion that the sale would be absolutely void. A conveyance made by the administrator to himself is *ipso facto* void, without regard to section one hundred and ninety-three, for it bears its own invalidity upon its face. But the conveyance to a third person after a sale to him, and a confirmation of the sale, although secretly made for the use of the administrator, gives such person a *prima facie* title to the land, and the invalidity of the title is made to appear, upon the fact being ascertained and determined in the proper Court, that the purchase was made by the administrator *per interpositam personam*. Before that fact is determined there would seem to be but little if any doubt that the third person who had taken the title for the administrator could pass it to a *bona fide* purchaser for a valuable consideration, without notice of the fraudulent purchase. It is true that if the sale is held to be absolutely void, he could not pass the title to an innocent purchaser; but the rules of equity, which were devised to protect the *bona fide* purchaser as well as the *cestui que trust*, would forbid that result, if it could be avoided consistently with the statute. The grantee of the purchaser at the administrator's sale, after having made all the inquiries that could be required of a prudent man, might be at the mercy of a fraudulent conspiracy between the persons

interested in the administrator's sale, resulting in the proof that the sale, that had in truth been made to the purchaser named, was in fact made to the administrator, through the intervention of the nominal purchaser. On the other hand, the *cestui que trust*, if the administrator in fact purchased at his own sale, has several remedies which may afford him adequate relief. He may have the sale set aside and the administrator declared a trustee; he may sue upon the administrator's bond, or he may proceed to recover the penalty of double the value of the land sold, according to section one hundred and eighty-nine of the Probate Act.

A conveyance cannot be said to be utterly void, unless it is of no effect whatsoever, and is incapable of confirmation or ratification. The acceptance of the purchase money, with full notice that the administrator was the purchaser, *per interpositam personam*, would unquestionably amount to a ratification of the sale. The Court would not countenance a partial disaffirmance of the sale, that would enable the *cestui que trust* to hold on to the purchase money, and at the same time recover the land. (*Terrell v. Auchauer*, 14 Ohio, 80.)

It is said by Mr. Chief Justice Spencer, in *Anderson v. Roberts*, 18 J. R. 528, "Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one." It is not declared by the statute that the purchase by the administrator is utterly void, but if it is held that the prohibition against his purchasing amounts to that, in effect, it does not necessarily follow that strangers can allege that the sale is void.

The statutes of the 13th and 27th Elizabeth, and the statutes of the States having the same general purpose, declare that sales, etc., made to hinder, delay, or defraud creditors shall be absolutely void, and the cases both in England and the United States holding that those sales are void only at the instance of the parties injured, are too familiar and numerous to

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require citation. In *Greene v. Kemp*, 13 Mass. 515, the purchaser of the equity of redemption attempted to set up and rely upon the statute declaring that mortgages, etc., tainted with usury, were "utterly void," for the purpose of defeating a recovery of the possession of the mortgaged premises by the mortgagee, who had foreclosed, but the Court held that the mortgage was merely voidable, and that as the defendant was a stranger to the mortgage transaction, and possessed no title in the land, but only a right to redeem, he could not rely upon that defense, and that only the mortgagor and those who may lawfully hold the estate under him could set up the usury. (See, also, *Jackson v. Henry*, 10 John, 195; *Dix v. Van Wyck*, 2 Hill, 522.)

An examination of the Probate Act will disclose the intent of section one hundred and ninety-three; and it is apparent that the object was not to declare who might or who might not become a purchaser of the property of the estate; but it was to prevent the property from being sold at a price less than its true value, which might be the case if the administrator, either directly or indirectly, prevented competition among the bidders, by entering into the market, either personally or by his agents, or if, with a view of purchasing, he was tempted to undervalue the property in his proceedings respecting the sale. The protection to the estate designed by that section, can be as fully secured by permitting the parties interested in the estate to set the sale aside and have the administrator declared a trustee, as it would be to construe the section so as to allow strangers to impeach the sale, with the consequent risk to the *bona fide* purchaser, without notice, from the administrator's agent, of losing the premises he purchased, relying on the apparent regularity of the probate proceedings and the confirmation of the sale.

The terms void and voidable are not always employed, either in the statutes or reports, with strict legal accuracy, but we find no case which, when critically examined in connection with the character of the action and the facts of the case, holds sales made in the face of a prohibition, such as is

found in section one hundred and ninety-three, to be utterly void. Many cases are found in which the *cestui que trust* or his heirs have sued to set aside the sale, or to have the trust established and declared, and in those cases the Courts have said that the sales were void, or were fraudulent and void; that is to say, that when the *cestui que trust*, or those claiming title under him, manifest their election to disaffirm the sale, and commence a suit to set it aside, the Court pronounces the purchase by the trustee at his own sale void as against the *cestui que trust*, and sets it aside and declares the trustee still a trustee, and orders a new sale, or affords such other relief as the exigencies of the case demand. Such was the case of *Michoud v. Girod*, 4 How, 503, which was a suit in equity, by certain heirs of a deceased testator, against the legal representatives of one of his executors, who was also one of the heirs, to obtain the complainants' just share of the estate of the testator. The two executors had purchased the property of the testator through an agent, and one of the executors purchased of his co-executor his half of the property; and the executor who held all the property having died, the suit was brought against his legal representatives. It will be seen that there were no "strangers" to the transaction among either of the parties. The complainants alleged that the sales were fraudulently made, and the defendants denied fraud in fact or intention on the part of the executors, and alleged that the sales were judicially ordered and conducted, that the purchases were rightfully made for a fair price and at public auction. The Court held that it would not in such a case enter into an investigation as to whether there was fraud in fact, or whether the sale was for a fair price and made at public auction, but that upon its being made to appear that the trustee had purchased at his own sale, the Court would set the sale aside as fraudulent and void, as against the *cestui que trust* without further inquiry. The language employed by Mr. Justice Wayne in delivering the opinion of the Court is comprehensive enough to express that the sale was absolutely void, but that point was not involved in the case, for if the

sale was held to be fraudulent and void at the instance of the *cestui que trust*, that disposed of all the questions arising upon that branch of the case, and, as we have remarked, there were no strangers to the transaction before the Court, but as plaintiffs, only some of the heirs of the testator and the representatives of other of the heirs; and as defendants, the representatives of one of the executors. That the Court did not intend to go further than to hold the sale voidable, appears from the fact that the rule as to the disability to purchase, cited from Sir Edward Sugden, is, in the language of the Court, "the rule as to persons incapable of purchasing particular property except under particular restraints, on account of the rules of equity," and according to those rules the sale was merely voidable; also from the fact that the cases cited by the Court, among which *Davoue v. Fanning*, 2 John. Ch. 252, is relied on as a "critical and able review of the doctrine, as applied by the English Courts of Chancery from an early day, and has been received with very few exceptions by our State Chancery Courts, as altogether putting the rule upon its proper footing," hold that those sales are merely voidable; and from the further fact that Court proceeded to set aside the sale complained of, which was a useless proceeding if it was absolutely void.

Hardy v. De Leon, 5 Texas, 211, appears, by a series of amendments, to have been converted from an action to recover the possession of the premises, into a suit in equity to set aside a certain tax sale and an administrator's sale, which had been procured by the fraudulent combination of the defendants. The plaintiffs were the heirs at law of De Leon, deceased, and the defendants were the administrators of De Leon and the purchasers at the tax sale and the administrator's sale. The person who, it was alleged, purchased and took the title for the administrator, and who still held the title, was made a defendant. No other person than the administrator and the purchasers were made defendants, and consequently the question whether the sale was absolutely void did not arise. On this subject the Court limit their remarks to one short paragraph and say that "a person cannot be both buyer and seller

at the same time;" and after stating the rule on that subject as given by Chancellor Kent, (4 Kent, 5 Ed. 438,) say: "It therefore was not error to instruct the jury, in effect, that a purchase made by a Sheriff or an administrator at his own sale is deemed fraudulent in law, and that a fraudulent sale is void. *Prima facie*, the sale so made was void, and there do not appear to be any circumstances in the case requiring the Court to consider the qualifications to which the rule may be subject." No statute is mentioned that prohibits such a sale, and the rule referred to was the rule in equity, and was not the rule at law, except in case where the sale was made by the administrator directly to himself, which would be void on its face, because there would be but one party to the nominal contract; and as the case called for no expression of opinion whether a sale by the administrator to himself, through the agency of a third person, was a complete nullity, we think the language, that the sale "is deemed fraudulent in law," was inadvertently used, the Court merely intending to declare that the sale was fraudulent and void at the election of the heirs of the deceased. That such was the meaning of the Court, is very manifest, for Chancellor Kent, in immediate connection with the passages cited by the Court, says: "It may be here observed, as a general rule applicable to sales, that where a trustee of any description, or any person acting as agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled as of course, in his election, to acquiesce in the sale or to have the property re-exposed to sale, under the direction of the Court," etc.

We have very clear and pointed authority on this question in the case of *Terrell v. Auchauer*, 14 Ohio State R. 80. It is provided by the statute of Ohio that "no Sheriff or other officer making the sale of property, either personal or real, nor any *appraiser* of such property, shall either directly or indirectly purchase the same; and every purchase so made shall be considered fraudulent and void." The defendant, who had been one of the appraisers of the land at a foreclosure sale, pur-

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chased the land, received a deed, and went into possession. The plaintiff, who claimed under a deed of trust, brought an action to recover the possession of the land. The Court say, in substance, that the mischief which the statute aims to prevent is obviously that which arises from fraudulent appraisements, made with a view to the individual advantage of the appraiser, when he becomes a bidder at the sale, and that the mischief is as effectually prevented by holding the sale to be voidable at the option of the parties interested, on a proceeding for that purpose, as it would be by holding it to be an absolute nullity; while the injurious consequences may be avoided which would often follow if the sale be held to be strictly void. We attach far less force to the argument of the Court in that case, drawn from the construction of the word "considered" in the clause of the Act declaring that "every purchase so made shall be *considered* fraudulent and void," as indicating that the purchase shall be held void when so adjudged by the Court, in a proceeding to avoid the sale, than we do to the other reasons advanced by the Court, and particularly those supported by the cases cited — (*The King v. The Inhabitants of Hipswell*, 8 B. and C. 471; *Pearse v. Morris*, 2 A. and E. 94; and *Anderson v. Roberts*, 18 John. 529) — holding that the word "void" will be construed as "voidable" when the provision is introduced for the benefit of the parties only, and not for public purposes, and to protect those who are incapable of protecting themselves.

We are of the opinion that by holding the sale to be void at the election of the heirs or other persons interested in the estate, the mischief intended to be prevented by the statute will be obviated, and at the same time those who, in good faith and without notice of the constructive fraud of the administrator, have acquired the title through the agent who purchased the property for the use of the administrator, will be protected from losses, which otherwise could only be effectually provided against by an utter refusal to purchase property that had been sold at an administrator's sale.

Fraud by an administrator in procuring an order of sale of land without necessity.

Actual fraud is alleged and relied on by the plaintiff, and he assigns as error the finding of the Court against him on that issue. The fraud complained of, stated generally, consisted in the administrator's having procured an order of sale from the Probate Court, when there was no necessity for it. He represented in his petition, filed December 18th, 1850, that the estate was indebted seven hundred and seventy dollars on the Biron mortgage, and about two hundred dollars for other debts, and that the personal property was insufficient to pay the debts and the expenses of administration. His final account, filed April 2d, 1851, shows that on the 23d of October, 1850, he received from Mary Hina eight hundred and ninety dollars on account of the estate. Instead of applying the money to the satisfaction of the mortgage, he purchased it in the name of Bidleman, for his own benefit. Doubtless the interest for two months—one hundred and forty dollars—was paid out of the money paid to him by Mary Hina. So far as the order of sale is concerned, and the fraud imputed to the defendant in procuring it, without any necessity, it would make no difference whether he left the mortgage unpaid in Biron's hands or caused it to be assigned to himself or to some third person for his use, for he having the funds in his hands, that might and ought to have been applied to the satisfaction of the mortgage, he should have taken the necessary steps to have procured an order that the funds in his hands be applied to that purpose; and the wrong consists in the fact that he procured an order of sale to raise money to satisfy a debt, which either had been paid or ought to have been paid out of moneys in his hands belonging to the estate. The administrator was without justification, so far as appears from the evidence, in procuring an order of sale to raise means to pay that debt. The payment might have been made soon after the receipt of the money in October, and at

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that time the payment of the mortgage and two months interest, requiring eight hundred and forty dollars, would have left in his hands fifty dollars. It is not charged, nor does it appear in the case that any of the property of the estate except the sum of eight hundred and ninety dollars and the lot in controversy, came to the possession of the defendant, and we may presume that the articles included in the inventory under the items "stoves, chairs and household furniture, two hundred dollars; trunk and clothes, one hundred dollars," remained in the possession of the widow of the deceased; and it is not alleged that they came to the defendant's hands. At the time of filing the petition for sale, there had been allowed the claims of appraisers and others, amounting to two hundred and ten dollars, and although the claims may seem exorbitant, yet they had been allowed by the Probate Judge as well as the administrator; and, as valid claims against the estate, they, together with administrator's fees, accruing and accrued, were required to be paid; and the administrator, not having funds in his hands sufficient for that purpose, was authorized and it was his duty to have raised the required funds out of the real estate by sale or otherwise. A sale of a small portion of the real estate would probably have been sufficient; but the Probate Court had jurisdiction, and we think the exclusive jurisdiction to determine what portion of the real estate should be sold for that purpose; and although the Court may have erred in that respect, its judgment cannot be revised or set aside in this collateral manner. The error can be reached only by an appeal taken directly from the order of that Court.

And the same may be said in respect to the order of sale, so far as it is founded on the alleged indebtedness on the mortgage, conceding that it had been paid (considering the assignment to Bidleman for the defendant as a payment by the estate, or as vesting the mortgage in the estate,) or that it was not a subsisting claim against the estate, or that it ought to have been paid by the administrator, still those were facts to have been proven before the Probate Court, on the hearing of the petition for sale. It is manifest that it was quite suscepti-

ble of proof, that the administrator had in his hands funds that should have been used for that purpose, and if those interested in the estate failed to offer the evidence they are in default; and if it was offered and was rejected by the Court, or having been received, the Court, notwithstanding the evidence, ordered the lot to be sold for the payment of the mortgage, it was error which might have been corrected on appeal; but if not so corrected, was final and conclusive upon the parties to the petition. The fraud, then, in procuring the order of sale, so far as the mortgage debt is concerned, amounts to this: that the administrator procured an order, either upon insufficient evidence, or contrary to the evidence that was accessible to the heir at law, and was or might have been introduced by her, which, instead of being a fraud of which another Court will take cognizance, is but the case of an error in the judgment of the Probate Court, or of neglect on the part of one of the parties to present his case; and we agree with the learned Judge of the Court below in his finding, that there was no actual fraud in procuring the order of sale, and in holding that in relation to the necessity or the sale, the plaintiff is concluded by the order declaring that it was necessary, and directing it to be made.

Ignorance as a ground of relief in equity.

It is proper to remark here that we do not concede as much force and consequence, as do the counsel for the plaintiff, to the fact that Mary Hina was an ignorant Kanaka woman, unacquainted with legal proceedings and almost ignorant of our language. We cannot obliterate the recognized rules of law, requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a measure of care and diligence for each particular case. If she did not understand the value of the receipt she said Blankman gave her for the money she paid him, or if she did not comprehend the meaning or the object of the petition for sale, unless it is also proven that she relied upon Blankman for information respecting those mat-

ters, and that he misrepresented them, her ignorance of their objects, value and meaning, affords no grounds for relief.

Statute of Limitations.

The defendant relies on the Statute of Limitations as a defense to the action. The statute is applicable alike to all causes of action — to a cause of action in equity as well as one at law. The statute governing this case, is found in the fourth subdivision of division third of section seventeen of the Act concerning the limitations of civil actions, which is as follows: "Within three years * * * an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." The cause of action accrued in 1851, the date of the purchase by Reis for the defendant at his sale as administrator. The defendant in his answer says "that the pretended cause of action in said complaint set forth, did not accrue at any time within five years next before the commencement of this action, and he sets up and relies upon the statute in such case made and provided in bar of said action, as if herein specially pleaded." The plaintiff in his replication denies "that the pretended cause of action in said complaint set forth did not accrue at any time within four years next before the commencement of this action;" and for a further replication he says "that the several acts of fraud set forth and alleged in said complaint were not discovered by said Mary Hina or this plaintiff until within three years next preceding the commencement of this action." The Court found "that the knowledge that the purchase of said premises at the probate sale, and at the foreclosure sale were made, and the lands held thereunder for the benefit of, and in trust for the defendant Blankman, did come to Mary Hina more than five years before the commencement of this action." As the acts constituting the fraud complained of are alleged to have been committed more than three years before the commencement of the action, the complaint should have stated the discovery of them within the three years, (*Sublette v. Turner*, 9 Cal. 423,)

but as the discovery within the three years is averred in general terms in the replication and the issue thereupon was tried without objection in the Court below, the finding will be taken as if made upon an issue properly raised by the pleadings.

It is objected that the defendant has not set up the particular Statute of Limitations applicable to cases of this nature, and that in order to avail himself of the benefits of any of the provisions of the statute, he should have pleaded all the statutes upon which he intended to rely, in separate defenses.

The defendant, relying for answer upon any provision of the Statute of Limitations is not required, nor do the rules of pleading permit him to allege matter of law. The facts are required to be stated which bring the case within the operation of the statute, and the Court will apply to them the law. To an action of ejectment the defendant pleads that the cause of action did not accrue within ten years next before the commencement of the action. This, though negative in form, is in fact an affirmative answer, and is in effect an averment that the cause of action accrued more than ten years before the commencement of the action. When tested by a demurrer, it will be found to be sufficient, for if it accrued more than ten, it must have accrued more than five years, next before the commencement of the action. The nature of the action, not the allegations of the defendant, will determine what statute is applicable as a bar to a recovery.

When the defendant demurs on the ground of the Statute of Limitations to a complaint, on the face of which it appears that the cause of action accrued anterior to the longest period prescribed as a bar, the demurrer is sustained, not because the complaint states as the time when the cause of action accrued, any period, the time from which to the commencement of the action, corresponds with the time prescribed in any particular statute as a bar, but because the time as stated since it accrued exceeds the time defined as a limitation of actions of that nature. If the plaintiff fails to state truly one of the essential parts of his cause of action, to wit: the time when it accrued — which, if stated, truly would show that he had no subsist-

ing cause of action, it is impossible to see why the defendant may not aver the truth in that respect, and if it is established on the trial, secure the same result.

The Court below found that the knowledge that the purchase of the premises at the probate sale was made for the benefit of and in trust for the defendant, came to Mary Hina more than five years before the commencement of this action, and the plaintiff complains of the finding on the ground that it was unsupported by the evidence. The defendant contends that the saving clause of section seventeen of the Statute of Limitations is applicable only to actions founded on fraud in fact. The rights of a party seeking relief on the ground of constructive fraud in an action cognizable only in equity, were conserved until a discovery by the aggrieved party, of the facts constituting the fraud, and as the Statute of Limitations is now applicable alike to all causes of actions, it would be but reasonable to hold that parties should have the benefit of the saving clauses of the statute in that class of cases as well as those that were formerly within the statute, if it can properly bear that construction; and as neither the limitation nor the saving clause is confined to cases of actual fraud, we see no reason for giving the statute the restricted construction claimed for it by the defendant.

The evidence in the record fails to show a discovery by Mary Hina of the fact constituting the fraud — that is, of the purchase of the property by the defendant, *per interpositam personam*, at his own sale — within three years next before the commencement of the action; nor does it appear that the facts actually or presumptively within her knowledge were sufficient to have put her, as a person of ordinary intelligence and prudence, upon inquiry. She is chargeable with knowledge of the state of the account between the defendant and the estate; of the petition for sale and the orders and proceedings thereon, and of the conveyance to Reis; and it may be conceded for the purpose of this question that she knew that the defendant, instead of satisfying the Biron mortgage, procured it to be assigned to Bidleman, who foreclosed it and

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purchased the premises for the defendant's use at the foreclosure sale; that Reis conveyed the premises to Bidleman, who afterwards conveyed them to the defendant; that she believed, when she was turned out of possession by the Sheriff under the writ issued upon the judgment in ejectment recovered against her by Bidleman, that she was dispossessed by the defendant; and that she consulted counsel, or attempted so to do, about recovering the lot from the defendant. But all these facts are consistent with the apparent fact that Reis purchased in good faith for his own use, and they were not sufficient to put her upon inquiry as to the true character of his purchase. The fact that she cherished her claim to the lot and intended, at some time, to institute proceedings for its recovery from the defendant, falls short of proving that she knew, or had any intimation of the capacity in which Reis acted in making the purchase. The respondent's counsel admits that Mary Hina may not have discovered for a time that the respondent became the purchaser through the intervention of another; and we are unable to find any evidence in the record tending to show that she afterwards made the discovery or was put upon inquiry, until her conversation with Bidleman in 1861.

Judgment reversed and cause remanded for a new trial.

Mr. Justice CURREY and Mr. Justice SAWYER being disqualified, did not sit in the cause.

JOHN S. HAGER v. JAMES SHINDLER AND SIMON SHINDLER.

JURISDICTION OF COURT OF EQUITY WHERE THERE IS A REMEDY AT LAW.—A Court of equity has jurisdiction at the suit of the judgment creditor who has purchased land at Sheriff's sale, and received a Sheriff's deed therefor, to annul and set aside, as a cloud upon title, a deed of the land given before the recovery of judgment by the judgment debtor, without consideration, and to defraud the creditor.

EQUITY AND LAW JURISDICTION.—Before a case can be considered as beyond the reach of a Court of equity, it must be made to appear that the legal remedy would be adequate and complete.

Points decided.

COMPLAINT IN ACTION BY CREDITOR AGAINST DEBTOR.—The complaint, in a suit in equity brought by the judgment creditor who has a Sheriff's deed of land, to set aside and cancel a deed of the same given by the judgment debtor before the recovery of judgment to defraud the creditor, need not aver that the plaintiff has exhausted his remedy at law by issuing an execution and having it returned *nulla bona*.

A CLOUD ON TITLE MAY BE REMOVED BY ONE NOT IN POSSESSION.—A Judgment creditor need not be in possession of land to enable him to maintain a suit in equity, after he has a Sheriff's deed, to cancel a deed of the same given by the debtor to defraud him before he recovered judgment.

COMPLAINT BY CREDITOR TO CANCEL FRAUDULENT DEED OF DEBTOR.—A creditor who has purchased land of the debtor at Sheriff's sale, and obtained a Sheriff's deed therefor, in a complaint to cancel a deed given by the debtor to defraud him before judgment was recovered, need not aver that the debtor was insolvent when he made the deed.

DEED TO DEFRAUD CREDITORS.—A deed of land may be made to hinder, delay, and defraud creditors by a rich man as well as one who is insolvent.

CREDITOR'S BILL AND SUIT TO CANCEL FRAUDULENT DEED.—There is a distinction between a creditor's bill and a suit in equity by one who has a Sheriff's deed of land, to cancel a fraudulent deed of the same made by a debtor before the Sheriff's sale or recovery of judgment.

LIMITATION OF ACTION TO CANCEL FRAUDULENT DEED.—The judgment creditor who has received a Sheriff's deed of the debtor's land, may bring an action to cancel a fraudulent deed of the same made by the debtor before judgment, at any time within three years after the execution and delivery of the Sheriff's deed.

COMMUNICATION FROM CLIENT TO ATTORNEY.—Whether a communication by a client to his attorney was made in confidence, is a question of fact to be disposed of by the Court.

WHEN ATTORNEY MAY TESTIFY TO CLIENT'S COMMUNICATION.—If the attorney, while managing a suit for the client, receives a deed of the client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds.

CLIENT AND ATTORNEY—CONFIDENTIAL COMMUNICATIONS.—If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained; the communication is not confidential.

PRIVILEGED COMMUNICATIONS FROM CLIENT TO ATTORNEY.—If an attorney is retained in an action, and the client after final judgment makes disclosures respecting the subject of the foregone employment, the communications are not privileged.

COMMISSIONER TO EXECUTE DEED.—The appointment of a Commissioner by the Court, in a final decree to execute a deed, if the defendant fail to do so within a given time; *Held*, not to justify the reversal of the judgment.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

E. Casserly, for Appellants.

Where plaintiff has an adequate remedy at law, he cannot go into equity. (*Dewitt v. Hays*, 2 Cal. 463; *Lupton v. Lupton*, 3 Cal. 121; *Merrill v. Gorham*, 6 Cal. 42.)

If the conveyance of the lot in question to Simon Shindler be void as against the plaintiff, he could have brought ejectment. (*Jackson v. Seward*, 5 Cow. 67; *Jackson v. Myers*, 18 Johns. 426; *Jackson v. Mather*, 7 Cow. 301; *Chat. Co. Bank v. Risley*, 19 N. Y. 369, 371, 372, 375.) A general rule further is, that before coming into equity, the plaintiff should first have exhausted his remedies at law, by issuing execution and having it returned *nulla bona*, which the bill should show. (*Hulbert v. Grant*, 4 Monroe, Ky. 582, and cases cited; *Heynemann v. Dannenberg*, 6 Cal. 380.) This rule is of invariable application to a bill filed by a creditor to reach equitable assets. The principle of it should reach this case, at least to the extent of requiring the plaintiff always to show, in asking equity to remove a cloud from the title to real estate bought by him under his own execution, that before selling his debtor's land, the personalty had been exhausted or that none had been found, as directed in the Practice Act. (Practice Act, 210, of "the execution.") Though when a stranger to the judgment purchases, the rule may be otherwise.

The plaintiff in this case sues with the rights of a "creditor" under the statute, not of a "purchaser." (*Ridgway v. Underwood*, 4 Wash. C. C. 129, 137; *Jackson v. Ham*, 15 Johns. 261.) A creditor is less favored than a purchaser, because the latter buys on the faith of getting a title to specific property, while the former has only a general right to have his debt paid out of any property of the debtor.

In New York the law may at length be deemed settled, (against many previous *dicta* at least, so far as it can be by two most elaborate and conclusive judgments of a Court of marked ability and learning, (though not the appellate Court,))

which have not yet been disturbed, that a judgment creditor cannot come into equity to set aside a conveyance alleged to be a fraudulent obstruction to an execution, without showing execution issued. (*McCullough v. Colby*, 5 Bosw. 477, and see decision 487 to 496, reviewing all the authorities; *North American Fire Insurance Company v. Graham*, 5 Sandf. 197 198, 204; see, also, *Neate v. Marlborough*, 3 Myl. & Cr. 407, 415-421, 14 Eng. Ch.)

The language of the complaint shows the fraud alleged in this case is under the Statute of Frauds of this State, and especially sections twenty and twenty-three. (Wood's Digest, 106, 107.) Those sections are a re-enactment without substantial change (as in the other States of the Union) of the English statutes of Elizabeth. Section twenty-three of our Act makes, however, an important change in the language, and in the meaning of the English statutes as re-enacted in the other States of the American Union, with the single exception, perhaps, of New York. It is as follows:

"The question of fraudulent intent in all cases arising under the provisions of this Act, shall be deemed a question of fact and not of law, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, *solely* on the ground that it was not founded on a valuable consideration."

One clear effect of this statutory provision is to abolish forever in this State the whole doctrine of "constructive fraud," with all its undefined and therefore mischievous consequences in jurisprudence. "It may be," says the New York Superior Court, in *Nicholson v. Leavitt*, 4 Sandf. 287, "that the doctrine thus meant to be exploded has been in a measure revived by some modern decisions; but we are satisfied that to revive the doctrine is to repeal the statute."

A cause of action for fraud is barred in this State in three years from the fraud, and there is no pretense in this case that the plaintiff did not know the facts at the time when they occurred. (Act defining time of commencing civil actions, etc., Sec. 17, sub. 4, Wood's Digest, 47.) The fraud occurred

Argument for Respondent.

and the cause of action accrued at the date of the conveyance to Simon Shindler, March 21st, 1855. (*Sublette v. Jenkins*, 9 Cal. 425; *Pyle v. Beckwith*, 1 J. J. Marsh, 445; 2 Parsons' Contracts, 371, 372, edition of 1855, and cases cited in notes *w, x, y, z.*) This is undoubtedly the true rule in this case, as otherwise a plaintiff would have it in his power by his own will to postpone indefinitely the running of the statute, which, by all the authorities, he never can do. Or, at all events, the cause of action accrued at the date of the Sheriff's sale to the plaintiff, February 2, 1856. (*Cox v. Cox*, 6 Richardson's Eq. S. C. 275; *McDonald v. May*, 1 Rich. 91; *Thrower v. Cureton*, 4 Strobhart's Eq. 155, S. C.) In either view the action was barred at its date, more than three years having elapsed.

The testimony of E. B. Mastick, a witness for the plaintiff, was inadmissible and incompetent within the established doctrine as to communications between attorney and client; and the Court erred in admitting it against the objections of the defendants respectively. (1 Phillips' Ev. 158, 159, N. Y. Ed. 59; *Williams v. Fitch*, 18 N. Y., 4 Smith, 551; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 595; *Turquind v. Knight*, 2 Mees. & W. 98; *Taylor v. Blacklow*, 3 Bingham N. C. 235; *Peter v. Watkins*, 3 Bingham N. C. 421; *Clayton v. Skinner*, 2 Swanst. 221; *In re Aitkins*, 4 Barnw. & Ald. 47; *Foster v. Hall*, 12 Pick. 89.)

The communication or the knowledge is privileged within the rule, though it be made to or acquired by the attorney in view or for the purpose of a contemplated fraud. (*Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 598-600, and cases cited; *Parker v. Carter*, 4 Munf. 273; *Cormack v. Heathcote*, 2 Brob. & Bing. 4; *Shellard v. Harris*, 5 Carr. & P. 593; *Landsberger v. Gorham*, 5 Cal. 450; *Bowman v. Norton*, 5 Carr. & P. 177.)

Delos Lake, for Respondent.

The appellants' proposition that the Simon Shindler conveyance may be attacked for fraud in an action of ejectment, and therefore equity has no jurisdiction to decree it to be fraudulent and void, is not sustained by any of the authorities

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cited, and is untenable. The following authorities are conclusive: *Hildreth v. Sands*, 2 John. Ch. 35; same case, 14 John, 493; *Mohawk Bank v. Atwater*, 2 Paige Ch. 54; *Willard's Eq. Juris.* 145; *Boyd v. Dunlap*, 1 John. Ch. 479; *Dane v. Zignego et al.*, October term, 1863.

The foregoing authorities are also an answer to the appellants' fourth point, viz: that the plaintiff must fail in the action, because he was not in possession at the time the suit was commenced.

The plaintiff sues with the rights of a purchaser at the Sheriff's sale, and stands in the same situation that he would if he had been a stranger to the judgment instead of being the judgment creditor. He is not pursuing the defendants as a "creditor," but as the *owner* of this land. He is invested, undoubtedly, with the same rights that he had as a judgment creditor to question the validity of the conveyances. In this sense he, as purchaser, may be said to have the rights of a creditor. (See remarks of Mr. Justice Spencer, in *Sands v. Hildreth*, 14 John. 497.)

The substantive cause of action is not the fraud of the Shindlers in passing the apparent title by the sham deeds, as the appellants' counsel erroneously supposes, but that the plaintiff has acquired a good title to the land by virtue of the judgment and execution sale and Sheriff's deed, and that Simon Shindler holds a void conveyance of a prior date, which, though good in form, is void in fact for fraud, and therefore a continuing cloud on the plaintiff's title; and the fraudulent acts, as set forth in the complaint, are stated for the purpose of showing that the conveyance is, in fact, void as against the plaintiff, and a cloud on his title, which a Court of equity ought to dispel. (2 Story's Eq. Juris., Secs. 699, 700, *et seq.*; *Pettit v. Shepherd*, 5 Paige, 492, 501; *Van Doren v. The Mayor of New York*, 9 Id. 388.)

But even if the action is one against which the statute would run, it has not yet barred the action.

The appellants' counsel has overlooked the fact that the Sheriff's deed to the plaintiff was made October 3d, 1857, and

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this action was commenced January 6th, 1860, less than three years thereafter. No cause of action accrued to the plaintiff, as purchaser, till he became the owner of the legal title. (Angel on Limitations, p. 55.)

The Sheriff's sale was December 10th, 1856, instead of February 2d, 1856, as stated in appellants' brief.

The appellants' counsel objects that the testimony of Mr. Mastick was inadmissible, under the rule that an attorney at law is not at liberty to disclose communications had between attorney and client. The rule undoubtedly is that an attorney will not be permitted to testify to communications made by his clients for the purpose of legal advice or aid upon the subject of his rights and liabilities. (1 Greenleaf's Ev., Sec. 240.) But this probably is the first case in which it was ever contended that the rule extended to the case where an attorney was an actor and party in the business—as the grantee in one conveyance, and grantor in another.

Greenleaf (Vol. 1, Sec. 242) says: "The rule is limited to cases where the witness learned the matter in question only as counsel, solicitor, or attorney, and in no other way. If, therefore, he was a party to the transaction, and especially if he were a party to the fraud, or, in other words, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing, for in such a case his knowledge would not be acquired solely by his being employed professionally."

So, where the attorney makes himself a subscribing witness, he thereby assumes another character for the occasion, adopts the duties which it imposes, and is bound to give evidence of all that a subscribing witness can be required to prove. (Id., Sec. 244.)

A fortiori, an actual party to the instrument.

None of the cases cited by appellants' counsel touch the question. Besides, Mr. Mastick was never the attorney for Simon Shindler.

It may be stated as a general proposition that a Court of equity has all the powers necessary to render its decrees

effectual. If it can act directly upon the property which is the subject of the suit, it may transfer the title by any convenient method. If the holder of the title be within reach of process, he may be compelled by attachment to execute the necessary conveyance. If he contumaciously refuse, or be beyond the jurisdiction, so that an attachment will not reach him, or if he be an infant, incapable of acting, the Court may appoint another to execute a conveyance on his behalf. Such has been the uniform practice in this State, and many titles to valuable lands are doubtless held under such conveyances. (*Yoden v. Stanford*, 7 Monroe, 478; *People v. Boring*, 8 Cal. 406.)

A case has recently been decided by the Supreme Court of the United States, (*Brignardello v. Matilda C. Gray*), on a writ of error to the United States Circuit Court for this State, where it is said this precise question was presented, and the power was sustained.

By the Court, SHAFTER, J.

The complaint in this action alleges that the plaintiff is the owner of a certain lot in the City and County of San Francisco, under and by virtue of a Sheriff's deed executed to him as the purchaser of said lot at an execution sale on the 10th day of December, 1856. That the execution issued upon a judgment in his favor against the defendant, James Shindler, and one Leonard, rendered February 2d, 1856. That at the time of the sale the lot was, and for several years had been, the property of James Shindler. That pending the action in which the plaintiff's judgment was recovered, James Shindler conveyed the lot to E. B. Mastick, who conveyed it thereafter to Simon Shindler. That both conveyances were voluntary and were made with intent to delay and defraud the creditors of James Shindler, of whom the plaintiff was one. The bill prays, amongst other things, that the deeds, respectively, may be decreed to be fraudulent and void. The case was tried by the Court — the findings were in favor of the plaintiff, and the

appeal is from the judgment, and from the order denying the defendants' motion for a new trial.

Right of purchaser at Sheriff's sale to go into equity, to have a fraudulent deed of the judgment debtor set aside.

First—It is claimed on behalf of the appellants that the case made is not within the equity jurisdiction, and the reason assigned is, that relief at law, by ejectment, would be adequate and complete.

In support of this proposition we are referred to *Dewitt et als. v. Hays*, 2 Cal. 463; *Lupton v. Lupton et als.*, 3 Cal. 121; *Merrill v. Gorham*, 6 Cal. 42. We have examined these cases. They recognize the general rule that the equity jurisdiction is limited to cases where there is no remedy at law or none that is plain, adequate and complete; but they throw little or no light upon the question as to whether this particular case is within the rule or without it.

It is not enough that the plaintiff could have established his title as against the title of Simon Shindler, in an action of ejectment. Before the case can be considered as beyond the reach of a Court of equity, it must be made to appear that the legal remedy would be adequate and complete.

The appeal here is to that branch of the concurrent jurisdiction in which the peculiar remedies afforded by Courts of equity, constitute the principal ground of jurisdiction. The relief asked is, that certain deeds, alleged to be fraudulent, may be cancelled by decree. The bill is brought upon the principle of *quia timet*; that is for fear that the deeds may be vexatiously or injuriously used against the plaintiff when the evidence to impeach them may have been lost. The justice invoked is not remedial so much as precautionary or preventive. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can retain it only for some sinister purpose. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title; and it is always liable to be

applied to improper purposes. Preventive justice is what is needed, and a Court of law has no power to administer it. (*Shattuck v. Carson*, 2 Cal. 588.)

Right of purchaser at Sheriff's sale to have fraudulent deed of judgment debtor set aside in equity before an execution is returned nulla bona.

Second—It is further insisted that the complaint is substantially defective for the reason that there is no allegation showing that “before coming into equity the plaintiff had exhausted his remedies at law by issuing execution and having it returned *nulla bona*.”

The purpose of the bill is not to reach equitable assets with a view to satisfy an unpaid judgment, or an unpaid balance of a judgment; but to clear up a title already vested by dissipating a cloud upon it. Whether the plaintiff sues as “creditor” or as “owner” is in one sense more a question of fact than of law. That he sues and asks relief in the latter capacity is apparent on the face of the complaint; and that he is owner in judgment of law does not admit of controversy, if all the allegations of the complaint be assumed. Taking the plaintiff, then, to be the owner of the land, the only question must be: is he entitled to the relief prayed for? But that is the question upon which we have already passed. Though the plaintiff is a purchaser suing and asking relief as such, still his title has its origin in the relation of creditor and debtor; and as against the deed of Simon Shindler, the relative strength of the opposing titles is to be determined by the law governing that relation, and not by that applicable to conveyances at large. A purchaser of land at execution sale, when he receives his deed becomes the owner of the land if the debtor owned it at the time of the sale; and in all proceedings looking to a vindication of his title, the purchaser must necessarily present himself as proprietor and ask for relief as such. But though he sues as owner, still he is clothed with the rights of the creditor, and stands in his place so far as may be necessary for the protection of his own title. The point was decided directly in

Ridgeway v. Underwood, 4 Wash. 129, and *Hildreth v. Lands*, 2 John. Ch. 49; S. C. 14 John. 497; *Dane v. Zignego et al.*, October term, 1863.

Purchaser of land at Sheriff's sale may go into equity to set aside a fraudulent deed of the judgment debtor without being in possession.

Third—It is urged, further, that the judgment cannot be sustained for the reason that the complaint does not show the plaintiff in possession of the land at the beginning of the action.

This is not a suit to quiet title, under the two hundred and fifty-fourth section of the Practice Act. In an action of that impression the title, and the whole title, of each of the parties is, or may be, drawn in question, and both parties are concluded by the judgment. This suit seeks the cancellation only of a particular muniment of title, and touches title only as it touches the muniment. But the point was decided in *Dane v. Zignego et al.*, previously cited, and the decision meets with our full concurrence. The Court said in that case: "The mere fact that the plaintiff is not in possession of the property can make no difference, as his right to have the fraudulent deed cancelled does not depend upon any such fact. Neither is it necessary for him to have previously had his title tried in an action at law. Indeed one important object of the plaintiff in bringing his suit in equity to obtain a decree cancelling the deed, under the old system of practice, was the better to enable him to prosecute his action at law to recover the possession of the premises by removing an obstacle to his recovery."

Purchaser of land at Sheriff's sale who files a bill to set aside a fraudulent deed of the judgment debtor need not aver his insolvency.

Fourth—It is claimed that the complaint is fatally defective, for the reason that there is no allegation that James Shindler was insolvent when he made the first deed, or when he directed the second.

The complaint charges the judgment, the execution thereon,

the purchase by the plaintiff and the Sheriff's deed to him. That, pending the action in which the judgment was recovered, James Shindler conveyed to Mastick and he to Simon Shindler by request of James; that both deeds were without consideration; that both were made with intent to hinder, delay and defraud the plaintiff and other creditors of James Shindler, to whom he was largely indebted; that Mastick took and held in secret trust for James Shindler; that Simon Shindler took and held in secret trust for James Shindler, also, "and with the intent to aid and abet him in hindering, delaying and defrauding his creditors." The truth of these allegations being given, they, in our judgment, present a perfect basis for the equitable relief asked for in the bill.

There is a class of cases in which a party seeking the relief of injunction must aver that the defendant is insolvent; and if a judgment creditor brings a bill to reach equitable assets, he must aver insolvency, or, what is equivalent to it, an execution returned *nulla bona*. In these cases, insolvency is *per se* a condition of relief; a fact, in short, without which a Court of equity can have no jurisdiction to act in the given instance. It is one of the ultimate facts to be proved, and hence the necessity that it should be averred. But in a case like the one at bar, "insolvency" is not a fact of jurisdictional consequence, nor is it *per se* a condition of relief. The facts upon which the jurisdiction rests, and on which the relief is granted, are stated categorically in the Statute of Frauds, and insolvency is not of the number. Section twenty provides, in effect, that every conveyance, made to defraud creditors, shall be void as to them, whether the deed was on consideration or without it; but section twenty-three provides that no conveyance shall be adjudged fraudulent as against creditors or purchasers, "solely on the ground that it was not founded on a valuable consideration." Whether a voluntary deed should be considered fraudulent, as such, as to existing creditors, without proof of any fact extraneous to itself, was a question that had long vexed the tribunals (1 Story's Eq. Juris., Sec. 365), and section twenty-three was made a part of the Act

referred to, for the purpose of putting an end to the controversy. (*Nicholas v. Leavitt*, 4 Sandf. 287.) As the law now stands, then, a conveyance cannot be set aside by an "existing" creditor, on the ground solely that it was voluntary. A complaint framed for the purpose named, while stating that the deed was without consideration, should aid or help out that averment; not by averring insolvency, for that is but a circumstance; not by averring generally that the deed was "fraudulent," for that is but a conclusion of law; but by averring the fact, superadded by the statute, to wit: that it was made with the "intent to hinder, delay or defraud creditors." The state of the grantor's worldly affairs may be used as evidence to elucidate the intent if disputed; but as matter of pleading, it is not necessary that insolvency should be averred in the complaint; and for the obvious reason that the fact does not enter as a term into the legal proposition. A rich man may make a fraudulent deed as well as one who is insolvent.

The point made has, moreover, passed into judgment. In *Sands v. Hildreth*, 14 John. 498, the Court say: "It has been urged that Comfort Sands (the fraudulent grantor) might have had property abundantly sufficient to satisfy his creditors independently of the lands sold to the respondent (the holder of the Sheriff's deed.) This, however, is not proved; and if it were true, the appellant (the fraudulent grantee) was bound to make out the fact." If the burden of proving solvency is upon the party claiming under the fraudulent deed, it cannot be true that the party attacking it should allege the contrary.

As to the deed to Mastick, inasmuch as the complaint shows the title out of him, it is enough that he in fact held the title in naked trust for his grantor, even though the trust was created for an honest purpose. This is the clear result of the eleventh section of the Statute of Frauds. And as to the deed to Simon Shindler, the complaint alleges not only that he took in secret trust for James Shindler, but "with intent to aid and abet him in hindering, delaying and defrauding his creditors, and especially this plaintiff."

We have been referred, in support of the objection now under consideration, to *Kinder v. Macey*, 7 Cal. 206; *Harris v. Taylor*, 15 Cal. 348; and *Meeker et al. v. Harris et al.*, 19 Cal. 278. The first and second cases were creditors' bills brought to reach equitable assets; and in the third case the intervention was filed for that purpose. The distinction between the complaint in this action and a creditor's bill has already been pointed out, and the reasons why an averment of insolvency, though essential in the one case, is not essential in the other, have been sufficiently indicated.

Limitation of time within which purchaser at Sheriff's sale may commence an action to set aside a fraudulent deed of the judgment creditor.

Fifth — It is insisted that the complaint shows on its face that the action is barred by the Statute of Limitations.

The cause of action does not consist in the detached or isolated fact that the deeds in question were given with the intent charged. The gravamen of the complaint is that the plaintiff, as owner of the land, is liable to be injured by the deeds if they are allowed to remain uncanceled. The particular danger which the plaintiff seeks to avert neither is nor can be older than the title which it threatens. True, the deeds were given more than three years prior to the commencement of the action, but they foreboded no injury to the plaintiff's title when they were given, for at that time he had no title. In short, the plaintiff's right to bring this action does not antedate the facts in which it has its origin. The plaintiff became the owner of the land on the 3d day of October, 1857, when he received the Sheriff's deed; and he had then, for the first time, a title to be clouded. The action was brought within three years thereafter. It is no answer to say that the plaintiff while yet a judgment creditor might have sued in that capacity for the purpose of reaching the land as equitable assets. Such action would have differed from this both in gravamen and relief. There are obvious correspondences between the two actions, but there are specific differences between them also, and they are too manifest to be disregarded.

When attorney may be compelled to testify to matters occurring between himself and client.

Sixth — It is claimed that the judgment should be reversed on the ground that the testimony of the witness Mastick was improperly admitted.

Mastick was called as a witness by the plaintiff for the purpose of proving that the conveyance by James Shindler to him and the conveyance by him to Simon Shindler, were both without consideration. The witness testified that he was a lawyer, engaged in practice in the City and County of San Francisco in the years 1853-4 and 5, and that "all of his knowledge concerning the matters connected with the issues was acquired by him as an attorney of James Shindler, and in the course of his communications with him as such; that his professional relations with James Shindler continued from early in 1854 until 1855, and until after all the transactions in question were disposed of, and that but for these relations he would not have had any connection with the matter at all." The plaintiff thereupon proposed to prove by a witness that both the conveyances aforesaid were voluntary; the defendant James Shindler, by his counsel, objected to the introduction of the evidence. The objection was overruled, and the defendant excepted.

The witness testified as follows: "Some time in 1854 I brought a suit for James Shindler against Samuel Youngs, of Sacramento City, and attached certain real estate there, which was then mortgaged to a woman, who placed the mortgage with a banker, who foreclosed it after the attachment. We then believed there was a margin between our attachment and the mortgage lien, and we determined to redeem; to do which it was necessary to raise some money. When the time for redeeming arrived, James Shindler had, I think, left the State. I consulted with Gray — Hawes was here too — and Shindler's power of attorney authorized a sale, but not a mortgage. The land was conveyed to me, that I might raise money by mortgage, which we had then negotiated. Gray then conveyed to

me under his power. I had then negotiated with G. J. Hubert Saunders, as agent of Rebarb Bros., to procure the money. I think I borrowed six thousand dollars, which I think I passed over to Gray. After a little, property began to fall in Sacramento and our supposed margin vanished. No redemption was made. I do not know what became of the money after it passed out of my hands. After a little time I applied to Saunders, and he consented that the mortgage should be discharged. I was then authorized by Joseph Hawes, and I think by Gray, to go to Horace Hawes for the money. I took an order or check for the money, by whom signed I do not remember, to G. J. Hubert Saunders. In an hour I got the money of Horace Hawes, took it to Saunders and got satisfaction, which was genuine. Subsequently I made a conveyance to Simon Shindler, March 21st, 1855, recorded at my request March 27th, 1855. I consulted Gray, attorney in fact of James Shindler. It was done with his assent and under his direction. I received nothing and had no interest in the property. I know that it was a regular business transaction. There was no sham or fraud about it. * * I do not remember that the suit of *Hager v. Shindler* was ever spoken of by James Shindler or any of the parties in connection with any of these conveyances. Nothing was ever said as to the object of the conveyance from me to Simon Shindler. As I paid nothing for the property, I could not have received anything for it. The conveyance to Simon Shindler ended my connection with the entire business."

Questions arising under the law of "privileged communications" have been presented for judicial consideration under a great diversity of aspects, and the decisions in each of the different classes of cases have been greatly multiplied — one decision following and being, in effect, but a reproduction of others which have preceded it on the common line. But there is one aspect in which, so far as we are advised, the general question has been presented in two instances only: *Harvey v. Clayton*, 2 Swanst. 232, and *Jones v. Pugh*, 1 Phil. 96. The distinguishing feature of these cases is found in the fact that pend-

ing the relation of client and attorney, the parties entered into another contract relation differing in essential character, but still ancillary to the purpose for the accomplishment of which the principal relation was formed. We shall have occasion to consider these cases more particularly hereafter, but dismiss them from further consideration for the present with the remark, that the fact that they are distinguishable from all others in the particular named, demonstrates the settled disinclination of both the English and American bar to embarrass themselves in the discharge of their strictly professional duties by the acceptance of trusts which, as lawyers, they cannot be said to have invited.

It appears that the witness in this case was called for the double purpose of proving that he held the land conveyed to him by James Shindler in trust for his grantor, and that Simon Shindler, his own grantee, held in trust for the same party. These results the plaintiff proposed to establish by testimony drawn from the witness that both conveyances were without consideration.

I. We shall in the first place consider the admissibility of the testimony in its bearings upon the deed of James Shindler to the witness.

For the purposes of discussion, it may be assumed that all the knowledge of the witness as to whether the deed was given with or without consideration, was "communicated" to him by James Shindler as his client, and in the ordinary course of professional employment; leaving the question whether the communication was or was not confidential as the only point to be decided.

Prima facie, all communications made by a client to his attorney or counsel, connected with the purposes with a view to which the relation was entered into, must be regarded as confidential. But the presumption is not conclusive. If it appears by extraneous evidence, or from the very nature of the transaction, that confidence was not, and on the maxims by which human nature is ordinarily governed, could not have been contemplated, then the fact communicated may be proved

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by the testimony of the attorney. In *Gown v. Emery et al.*, 18 Maine, 82, Kinsman, counsel of Buxton in another action, was called to prove by whom he was employed. The Court say: "We cannot consider this as a matter of professional confidence, at least, unless counsel is apprised or has reason to believe that his client desires that this fact should be concealed. No such inference is to be drawn from the testimony of the witness. Buxton made no intimation of a wish not to be known in the business. He solicited no advice tending to produce such an impression upon the mind of the witness. When the counsel (the witness) delivered the writ to the officer (Gower) the latter might well have inquired by whom he was to consider himself employed. An answer truly made to that inquiry would have been no breach of the privilege of his client. It would have disclosed his principal to a party having a right to know, in a matter neither communicated as a secret, nor of a character requiring any reserve on his part. That the witness was employed by Buxton and was directed by him to follow the orders of Stimpson, might, without any violation of confidence, so far as we can discern, have been made known to the officer, and was in our judgment testimony legally admissible." We have cited this case for the purpose simply of showing that whether a communication by a client to his attorney was made in confidence, is a question of fact, to be disposed of on principles applicable universally to questions of that character.

We must assume that the Court below passed upon the point as involving a matter of fact, and found that Mastick's knowledge of the voluntary character of the deed was not confidential; and we consider the finding to be well sustained by the evidence.

In the first place, there can be no pretense that the deed itself was executed in confidence, however it may have been a "communication" in the larger definition given to that term by many of the authorities. The deed was made with a view to publicity, and Mastick formally published it to the world seven days after its delivery by causing it to be recorded.

That the voluntary character of the deed was not known to Mastick in confidence is apparent also. The deed, so far as Mastick's testimony goes, was made for an honest purpose, and there was, therefore, no motive for secrecy. The purpose was to raise money with which to redeem the lot in Sacramento from a prior lien, so that the lien of Shindler's judgment might be made available. This purpose was not fraudulent as to Shindler's creditors, nor was it necessarily injurious to them; but, on the contrary, had the purpose been accomplished, their chances for collecting their debts would have been promoted. Mastick states that the deed looked to the redemption named as its sole object, and that beyond that nothing was talked about or thought of.

It is settled that if a client, pending the relation, communicates to his attorney a fact foreign to the object for which the attorney was retained, the communication is not to be regarded as confidential. The scope of the confidence is as the scope of the purpose. Each is considered to be the exact measure of the other. In this case the sole purpose was to raise money, to be used by the client for the preservation of a right; and to that end, whether the deed in question was on consideration or without it, was a matter of entire indifference from the beginning. So far as results were concerned, a power of attorney to Mastick to borrow money and to mortgage to secure the loan would have put him in a position to do all that he was expected to do as grantee under the deed. Had Gray's power of attorney from Shindler authorized him to borrow and mortgage, it is apparent on the face of the testimony that the conveyance to Mastick would never have been made. This demonstrates how utterly foreign to the purpose for which the witness was professionally employed was this question of consideration, in the judgment of parties, at the time the deed was given.

In the decision previously rendered, we considered the case as falling within the analogy of *Harvey v. Clayton*, 2 Swanst.

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232, and *Jones v. Pugh*, 1 Phil. 96. We are now satisfied that in that particular we were mistaken. In *Harvey v. Clayton*, the defendant, a scrivener, had loaned money, intrusted to him by his clients, to the ancestor of the plaintiff. The securities were taken by the defendant in his own name, holding them in trust for those to whom the money belonged, and for whose benefit the securities were in fact given. The bill was brought to compel the trustee to disclose the names of the beneficiaries in the trust. The defendant answered that he was ready to receive his principal and interest, and to give to the plaintiff a discharge, or to continue the loan on payment of principal and interest; but as to discovery of the money or trust, he pleaded that he was a scrivener, and trusted with men's estates, and demanded the judgment of the Court whether he should be obliged to discover. The plea was allowed, "for it was safer for the plaintiff to be ignorant of the trust than to have notice of it, but it may be a ruin to the defendant in his trade to discover it, for no man hereafter will employ him. And what if it be the money of a recusant convict, person outlawed, etc.? Shall the debtor be revenged of his creditor, and wound him through the sides of his scrivener?"

There, as here, the legal adviser had consented to stand to his clients in the non-professional relation of trustee. There, as here, the trust was accepted as subservient to the purpose for which the principal relation was entered into. Thus far that case and the case at bar are analogous; but there is no further correspondence between them. There the adviser was interrogated with a view to discovery only; here with a view to discovery and relief. There the facts inquired after were not essential to any right which the plaintiff proposed to assert in that or any other action, nor to any duty which he proposed to perform then or thereafter; while, on the other hand, if the discovery had been granted it might have prejudiced the attorney and his clients; and, as it would have notified the plaintiff of a dormant equity, the position of the plaintiff would have been rendered "less safe." But while the Court considered that the knowledge of the defendant as to the existence

of the alleged trust, its terms and the names of the beneficiaries was acquired by "communication" from his clients within the larger definition of the term, and in the due course of professional employment, it also obviously considered, on the averments of the plea, the facts to have been communicated in confidence. The facts having come to the knowledge of the defendant in the course of professional employment, the intendment, as previously suggested, would be that he knew them confidentially; and in that case there was nothing in the nature of the transaction nor in matters extraneous to rebut the presumption. "Confidence" was in fact alleged as a fact in the plea. Here, however, the presumption is irreconcilable not only with sundry direct statements of Mastick, but with the scope and purpose of the transaction also.

The other case, *Jones v. Pugh*, 1 Phil. 96, follows *Harvey v. Clayton*, and is like it in every substantial particular; and the result is, that the testimony of Mastick, that Shindler's deed to him was without consideration, was in our opinion properly admitted, on the ground that his knowledge of the fact was not within any confidence reposed in him by his client. It may be true that the testimony, in so far as it disclosed the object of the conveyance, was improperly admitted. But the original purpose, with a view to which the deed was executed — the redemption of the Sacramento lot — was not unlawful in itself, nor could the discovery of it have prejudiced the defendants. Mastick's testimony could have affected the result only in so far as it bore upon the disputed question of consideration.

II. As to the admissibility of Mastick's testimony that his own deed to Simon Shindler was without consideration, we have no doubt.

In the first place, the relation of client and attorney *quoad* the purpose for which the first deed was given, was not on foot at the time when the deed now in question was executed. It is settled, if an attorney is retained in an action, and the client after final judgment makes disclosures respecting the subject of the foregone employment, that the communication

is not privileged. Here the borrowed money, as Mastick's testimony tended to prove, was returned, the securities given up to be cancelled, and the very project of redemption about which Mastick had been professionally employed, was definitively abandoned in advance of the second deed. Or if Mastick's employment was to collect Shindler's debt without special reference to the lot or the redemption of the lot in Sacramento, still his deed to Simon Shindler could have had no connection with any such result. In the matter of that deed Gray, the attorney in fact of James Shindler, approached Mastick simply in his capacity of trustee of the title, holding it no longer for professional uses. The direction to convey to Simon Shindler went, not on the ground that it was the professional duty of Mastick to convey, but on the ground that it was his duty as trustee to execute such estates in the trust property as the beneficiary should direct. It does not appear that Mastick was consulted concerning effects and consequences, and he says in terms: "I do not remember that the suit of *Hager v. Shindler* was ever spoken of by James Shindler or any of the parties, in connection with any of these conveyances. Nothing was ever said as to the object of the conveyance from me to Simon Shindler; I know that it was a regular business transaction." However, then, the conveyance to Mastick, with its incidents, may have become known to Mastick by "communication" from his client, it is apparent that the conveyance by him, with its incidents, became known to him only in his capacity of trustee. It was made after the relation of client and attorney was practically ended, or, if not, then it was made with reference to no end concerning which Mastick was ever professionally employed or consulted.

Seventh — It is urged that the findings are not sustained by the evidence.

We have examined the evidence. The case does not belong to the class in which we hold ourselves at liberty to go behind the findings.

Eighth — The objection that the judgment is not supported by the findings is overruled. The questions raised by counsel

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under this head are identical with those raised upon the sufficiency of the complaint.

Appointment of a commissioner by the Court to make a deed.

It is insisted, however, that the judgment should be modified, if not reversed. The objection taken is to that part of the decree appointing a commissioner to execute to the plaintiff a deed of all the right, title and interest of Solomon Shindler in the land, in the event that Shindler should not make such conveyance himself within twenty days.

The point made is that without a statute there is no authority for such a direction. It may be added that no authority is produced against it. The question is left by counsel unargued. Probably the strongest objection that can be urged is that the direction was unnecessary, inasmuch as the decree pronouncing the adverse deeds to be null and void, executed itself and left the plaintiff in full enjoyment of the title acquired by his Sheriff's deed. A deed from Shindler must be regarded as non-essential, for the decree settles that he has nothing to convey. But as the error, if there be one, "does not affect any substantial right" of the defendants, (Prac. Act, Sec. 71,) the objection must be overruled.

Judgment affirmed.

SAWYER, J., concurring.

I do not think the matters offered to be shown by the witness, Mastick, are within the rule or the principle of the rule at common law protecting confidential communications, as deduced from the cases; and section three hundred ninety-six of the Practice Act, in my judgment, does not extend the principle.

James Shindler conveyed certain lands to Mastick, and Mastick subsequently conveyed the same lands to Simon Shindler, the father of James. These conveyances were claimed by plaintiff, a creditor of James, to have been made without consideration and with intent to defraud him. They were there-

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fore claimed to be void as to him. The whole scope of the proof offered, was, that the conveyance was made by James Shindler to Mastick, and also by Mastick to Simon, without consideration. This is the substance of the testimony. Whatever was said beyond this was not called for by plaintiff, and was merely exculpatory; and, so far as it went, was clearly to the advantage of the objecting party. The fact that Mastick neither gave nor received any consideration for the conveyances made to and by him, was not, in my opinion, a "communication made by the client to him, or his advice given thereon in the course of his professional employment," within the meaning of the rule or the statute. It is true that Mastick may have been employed to act as broker, or agent of Shindler, because he was also his professional adviser. But this is no part of his professional duty. Any other party might just as well have performed this service, and acted as the medium of carrying out Mastick's professional advice. But by taking on himself this new office, Mastick became a party acting in the transaction, by which it is claimed that a fraud was perpetrated; and it matters not that he had no personal interest in the transaction, and reaped no benefit from the fraud, if any there were. The fact proved had no previous existence. It was brought into being by the witness becoming an actor in a transaction that had no professional character. In this he was acting as a medium for transmitting an estate, without consideration, from James to Simon Shindler, and not in receiving a communication for professional purposes, or in giving professional advice.

It is admitted that there are exceptions to the rule, or rather cases that do not come within it, and that one of them is, where "an attorney is a party to the transaction, and especially if he is a party to a fraud," "if he were acting for himself." If he is in fact a party to the fraud, or to the fraudulent transaction, whether aware of the fraudulent intention or not, I do not think it makes any difference whether he is acting for himself, or for somebody else.

In *Duffin v. Smith*, Peake, 108, usury in a mortgage was

proved by the plaintiff's attorney, who prepared the deed, and who was called by the defendant to prove the consideration usurious. Lord Kenyon, in that case, said that "when the attorney himself is, as it were, a party to the original transaction, *that* does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person." Possibly this case, as stated in Peake, went too far, but it is by no means clear that it did.

Lord Chancellor Brougham, in *Greenough v. Gaskell*, 1 My. and Keen, 109, in which he reviews all the cases, commenting on this case, says: "It may be doubted if the attorney preparing the deed be not confidentially intrusted as an attorney in so doing. But Lord Kenyon proceeds upon the assumption that he is not; that on the contrary he is *quasi* party, and he seems to liken the case to that of a co-conspirator, where clearly there is no protection." Greenleaf refers to the case of *Duffin v. Smith* as one without the rule, and states the principle of the case as follows: "The attorney may be compelled to disclose * * * usury in a loan made by him as a broker as well as attorney to the lender." (1 Greenl. Ev., Sec. 445.) Thus stated, and on the assumption upon which Lord Kenyon proceeded, I have no doubt the principle is entirely correct. It was so held in *Dudley v. Beck et al.*, 3 Wis. R. 285, a case which appears to me to be directly in point.

In the case now in hand the witness was not merely the attorney to advise and prepare the deed, but he stepped outside the line of his professional character, and became a party to the conveyances—an actor in the transaction. And in the character of grantee and grantor—of party to the conveyances—he acquired his knowledge of the fact that there was no consideration paid. I cannot think a fact thus brought to the knowledge of the witness is within the rule or the principle of the rule. If so, the rule would afford great facilities for perpetrating and concealing frauds. It would only be necessary to find an attorney who is willing to do the double duty of advising as to the mode of proceeding, and then acting as the agent or instrument in the execution of the plans

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devised, and all evidence of the transaction, except so far as the party himself could be compelled to disclose it, would be shielded from judicial inspection.

In my judgment it makes no difference, so far as the question under discussion is concerned, that Mastick had no knowledge himself of any fraudulent intent on the part of the Shindlers; his knowledge of the fact sought to be proved was still acquired by him in his capacity of party to the conveyances, and not in his professional character. And, in the language of Judge Story, "the person called as a witness must have learned the matter in question only as counsel, or attorney, or solicitor, and not in any other way" (Story's Eq. Pl. 601); or in that of Lord Brougham, "The privilege shall be excluded when the communication is not made or received professionally, and in the usual course of business." (1 My. and K. 115; see, also, *Gore v. Harris*, 8 Eng. L. and Eq. R. 149.)

In *Brown v. Martin*, 25 Cal. 88, this Court held that a defense founded upon the Statute of Limitations will not be entertained on demurrer unless the statute is specifically stated as a ground of demurrer in the demurrer filed. I dissented for reasons stated at the time, but the point was fully discussed in that case, and I shall henceforth regard the question of practice determined as settled in this State. Under the decision in *Brown v. Martin*, the record in this case does not present the point made on the Statute of Limitations, and for this reason it is unnecessary to express any opinion upon it.

Upon the other points determined in the leading opinion I concur.

**TIMOTHY L. HOWE AND JONAS S. SIMPSON v. THE
INDEPENDENCE CONSOLIDATED GOLD AND SIL-
VER MINING COMPANY.**

ORDER VACATING A JUDGMENT ENTERED BY DEFAULT.—An order vacating a judgment entered by default and allowing a defendant to answer, will not be disturbed by the appellate Court except in cases of gross abuse of discretion by the Court below.

Statement of Facts.

COSTS ON VACATING JUDGMENT.—An order vacating a judgment entered by default, and allowing the defendant to answer, should require the payment of previous costs as a condition of setting aside the judgment.

APPEAL from the District Court, First Judicial District, Los Angeles County.

This was an action for the recovery of money alleged to be due for work and labor. The defendant demurred, the demurrer was overruled, and ten days were given to answer. The ten days having expired, and no answer having been filed, on application of plaintiff, the Clerk entered judgment by default against the defendant.

The defendant moved the Court to vacate the judgment, and to be allowed to answer, and upon the hearing of the motion, used the following affidavits:

“Personally appeared E. S. Roberts, one of the defendants in the above stated case, and Secretary of said company, who being duly sworn, makes oath and says: That the defendants in the above stated case have a meritorious defense to said action, in this, that it is a suit on a contract for sinking a shaft or incline, and that plaintiffs did not comply with the terms of said contract, and are not, therefore, entitled to recover as he is advised by his counsel, V. E. Howard, to whom he has fully stated the case and the facts thereof.

“E. S. ROBERTS.”

“Personally appeared V. E. Howard, who being duly sworn, makes oath and says: That he is attorney for the defendants in the above stated case; that he is informed and believes that the defendants have a meritorious defense of the same, the suit being on a contract for sinking a shaft or incline, and the defense, non-compliance with the contract.

“That at a former day of this term a demurrer to the complaint in this case was overruled, and leave to answer in ten days; that said time having expired, plaintiffs took judgment by default on Monday last, and after the case was set for trial.

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"Affiant states that during the present term he has been very much pressed for time, having to discharge his duties as District Attorney, besides attending to all his civil business, without any one to aid him—C. V. Howard, his associate in business, having been all the time absent in San Francisco; that consequently he has had many things on his mind demanding his attention, and much writing and labor. That this case being set for trial, affiant had adopted the erroneous idea that an answer had been filed. Affiant states that plaintiffs have not been injured by his failure to file an answer, as the case could not have been tried, and an answer can now be filed before the case can be reached on the docket. This affidavit is not made for delay, but that justice may be done in the premises.

V. E. HOWARD."

The Court vacated the judgment and gave defendant leave to answer, and plaintiff appealed from the order.

Gitchell & Chapman, for Appellants, cited *Haight v. Green*, 19 Cal. 119; 19 Cal. 605; *Elliott v. Shaw*, 16 Cal. 377; *Smith v. Billett*, 15 Cal. 23; and *Harlan v. Smith*, 6 Cal. 173.

V. E. Howard, for Respondent.

By the Court, SANDERSON, C. J.

Orders of the Court below on applications made under the sixty-eighth section of the Practice Act will not be disturbed by this Court except in cases of gross abuse, where the power of the Court has been exercised in a manner which is calculated to defeat rather than advance the ends of justice, which, in our judgment, has not been done in the present case.

The order, however, is erroneous in not imposing the payment of previous costs as a condition of setting aside the judgment. In such cases the payment of costs is expressly required by the statute, and the order must be modified accord-

Points decided.

ingly. Thus modified, the order will be allowed to stand, but the respondents must pay the costs of this appeal.

Ordered accordingly and the cause remanded for further proceedings.

J. S. EMERY v. G. B. BRADFORD.

CASE AFFIRMED.—*Emery v. San Francisco Gas Company* affirmed.

EVIDENCE IN SUIT FOR STREET ASSESSMENT IN SAN FRANCISCO.—In an action by a contractor against the owner of a lot in San Francisco to recover the tax assessed on the same for work done on the street in front of the lot under a contract with the Superintendent of Public Streets, if the contract was fulfilled to the satisfaction of the Superintendent, the defendant cannot introduce evidence to prove that the work was not done according to the specifications of the contract nor in accordance with the ordinance.

THEORY OF THE LIABILITY FOR STREET ASSESSMENTS.—The lot owner is not held liable on the theory that there is a contract between him and the street contractor. The assessment is levied and collected by virtue of the sovereign power of taxation, and its validity depends upon the same general principles applicable to taxes proper levied for ordinary governmental purposes.

FULFILMENT OF STREET CONTRACT IN SAN FRANCISCO.—The remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the Superintendent of Public Streets that the contractor has fulfilled his contract, is an appeal from such decision to the Board of Supervisors.

FULFILMENT OF CONTRACT OF STREET CONTRACTOR.—An error in determining whether a street contractor in San Francisco had fulfilled his contract is not a jurisdictional defect which vitiates an assessment levied on a lot to pay for the work specified in the contract.

PERSONAL JUDGMENT AGAINST OWNER OF LOT FOR ASSESSMENT.—The contractor is entitled to a lien on a lot in San Francisco and to a personal judgment against the owner for the amount of an assessment levied on the same for work done on the street in front of the same.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Court rendered a personal judgment against the owner of the lot, but did not order a sale of the lot.

The other facts are stated in the opinion of the Court and dissenting opinion of Mr. Justice Currey.

Argument for Appellant.

H. H. Haight, for Appellant.

As one of the distinguishing attributes of sovereign power, it is never allowed but in cases clearly within the spirit of that constitutional provision which requires the just compensation to precede or accompany the taking of a citizen's property from him without his consent. It has been held invariably that the law which provides for the taking must itself provide for the compensation; and that before the act of appropriation can be perfected, the compensation must be actually provided.

There are two or three principles to be deduced from the judicial expositions of the constitutional provision forbidding the taking private property for public use without just compensation: First—The compensation must be provided in the law and must precede or accompany the taking. Second—The provision must be explicit and express, and not be left to doubtful inference or to any contingency.

The first principle has been so often decided that it has become a legal maxim. The second principle is as clearly stated in *Curran v. Shattuck*, 24 Cal. 432, as in any reported case, and that is the last exposition of the rule. The Court say that "the Board or officer must find the power to ascertain the compensation within the statute. A resort cannot be had for that purpose to implication." "If the statute has failed to provide the means or mode, it simply results that the compensation cannot be ascertained, and therefore the land cannot be taken for public use without the consent of the owner." This is the precise point of objection to the Act of 1862. It fails to make any provisions for apportioning and proportioning costs and benefits.

Jabish Clement, also for Appellant.

The appellant claimed the right of showing in the Court below that the work was not done in accordance with the contract, nor in accordance with the law; but his right to do so

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was denied by the Court on the ground that he had waived it by failure to appeal to the Supervisors. For convenience of reference, we quote here the material part of the section of the statute relating to appeals:

"SEC. 12. All persons, whether named in the assessment or not, and all persons directly interested in any work provided for in this Act, or in the said assessment, feeling aggrieved by any of the acts or determinations aforesaid of the said Superintendent in relation thereto, or having or making any objection to the *correctness* or *legality* of the assessments, shall * * * appeal to the Board of Supervisors as provided in this section. * * * The said Board may *correct*, *alter*, or *modify* said assessment in such manner as to them shall seem just, and may instruct and direct the Superintendent to correct said warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, or diagram, to conform to the decision of the said Board in relation thereto, at their option. All the decisions of said Board upon notice and hearing as aforesaid, shall be final and conclusive * * * as to all *errors* and *irregularities* which said Board *could have remedied and avoided*. The said warrant, assessment, and diagram, shall be held *prima facie* evidence of the *regularity* and *correctness* of the assessment and of the prior proceedings and acts of said Superintendent, and of the *regularity* of all the acts and proceedings of the Board of Supervisors, upon which said warrant, assessment and diagram are based." (Stats. 1862, p. 396.)

By a strange misapprehension of terms, this section has been relied on as cutting off all defense to a claim for street work, except by appeal to the Supervisors. The Superintendent of Streets is the assessor of property liable, or supposed to be liable, for street work. He ascertains the frontage of each individual property owner, the rate necessary to charge per front foot, and the amount of each property owner's liability. (Stats. 1862, p. 397, Sec. 9.)

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On appeal, the Board of Supervisors sit as a Board of Equalization, to correct any errors committed by the Superintendent in measurement or calculation, and to do any other act with reference to the assessment, within the scope of their powers as a legislative or ministerial body, and not involving the performance of any judicial act. This is manifest from the fact that the Board only has power to *correct, alter, or modify* the assessment. It may not say on appeal that the contractor has failed in his contract, so that no liability accrued against the property owners. It may not set aside a warrant, except upon ordering a new and different one in its stead. Its decision is final "only as to all errors and irregularities which it could have remedied and avoided"—not as to any facts and circumstances concerning the contractor's right to the assessment. And the warrant, etc., are *prima facie* evidence of the regularity and correctness of the prior proceedings of the Superintendent and the Supervisors—not *conclusive* evidence of anything. The expression, *prima facie* evidence, limits their character as evidence and permits the introduction of rebutting testimony, even as to the regularity and correctness of the assessment.

To hold that the statute does require any person having cause to show why he is not liable on a street assessment, to go as appellant to the Supervisors rather than as defendant into Court, is to declare the statute unconstitutional; for the Legislature cannot constitutionally grant to the Supervisors the powers that such a statute would give them; nor can it deprive a citizen of the rights that such a statute would take from him.

The charge against the property owner is a debt arising out of contract.

The Courts of other States, in their struggles to uphold, against the plain letter of the Constitutions of those States, street assessment laws similar to, but not identical with our own, have found it extremely difficult to fix upon any sovereign right as a basis for their decisions. Some have held that the legislative authority came from the right of eminent

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domain, and others have found what they deemed a sufficient warrant in the right of taxation. The late Supreme Court affirmed the authority of the Legislature to enact the law under consideration, by virtue of the taxing power. But our law differs from those passed upon in the cases from the reports of other States, which will be hereafter cited in the course of this argument, in this important particular: It expressly exempts the city and county from liability on the contract of the officers, and from all responsibility for the collection of the assessment, (Statutes of 1862, p. 394, Section 7;) while the laws relating to street improvements in other States impose upon the city authorities the duty of collecting the assessment and paying the contractor. We have not access to the various statutes, but the correctness of our statement will appear from the following cases: *People v. Mayor, etc., of Brooklyn*, 4 Comst. 419; *Sharp v. Spier*, 4 Hill, 76; *Mayor of New York v. Colgate*, 2 Kernan, 140; *Lake v. Trustees of Williamsburg*; 4 Denio 520-23; *Bonsall v. Mayor, etc., of Lebanon*, 19 Ohio, 418, 419.

That being the case, it is unimportant to inquire by what power the Legislature has enacted this law, for the authority, from whatever source it comes, is expended in constituting certain parties the agents of the citizen, with power to bind him and his property by contract. The Legislature does not ask of the citizen money with which to pay for street improvements; it simply requires him to do the work himself, or to employ, at his own expense, somebody else to do it; and for the better enforcement of the requirement, it has made the municipal authorities his agents in relation to the matter—special agents, with powers clearly limited and accurately defined. (*Lucas v. San Francisco*, 7 Cal. 470-474.)

According to the interpretation of this section that we are now combatting, the Legislature has said that the existence of all those concurrent facts and circumstances upon which depends the right of the plaintiff to recover in an action upon the contract must be ascertained or discovered by a tribunal which is not a Court, which could not under the Constitution

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determine a controversy, which has no means of enforcing the attendance of witnesses, which cannot impanel a jury, which, in short, has no strictly judicial powers whatever—and that, too, without appeal to any Court. The controversy is to be *determined* by the Court, but the facts upon which the determination of the Court must be based are to be found by a legislative Board.

The statute, if it is to be construed as the respondent claims, is repugnant to several sections of the Constitution:

1. "The right of trial by jury shall be secured to all," etc.—(Article I, Sec. 3.)

There is no trial by jury, and no occasion for one where there are no allegations to be disproved—where the facts are already conclusively determined; for the only province of a jury is to determine facts. (Mitchell, J., in *Weynheimer v. The People*, 3 Kernan, 458.)

2. "In any trial in any Court whatever, the party accused shall be allowed to appear and defend in person and with counsel, *as in civil actions*."—(Article I, Sec. 8.)

"Of what value is this right to 'appear and defend,' if the Legislature can clog it with conditions and restrictions which substantially nullify the right? The Constitution says every person shall have a right 'to defend.' The Legislature says you may defend, provided you first admit yourself *prima facie* guilty." (Selden, J., in *Weynheimer v. The People*, 3 Kernan, 443.)

In this case the Legislature says the defendant may defend, provided he has first procured the facts in dispute to be *conclusively determined* before a non-judicial tribunal.

3. "No persons * * * shall be deprived of life, liberty, or property, without due process of law."—(Article I, Sec. 8., next to the last clause.)

"Due process of law" includes not only a judicial trial by jury according to the course of the common law, but also a trial wherein the facts upon which the right in dispute depends, shall be ascertained according to the fundamental rules of evidence. (Selden, J., in *Weynheimer v. The People*, 3 Kern.

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446, 447; Comstock, J., Id. 392-395; A. S. Johnson, J., Id. 416-418; Hubbard, J., Id. 454; *Taylor v. Porter*, 4 Hill, 147; *Guy v. Hermance*, 5 Cal. 74.)

D. P. & A. Barstow, for Respondent.

The contract on the part of Emery was to do the work under the direction and to the satisfaction of the Superintendent of Public Streets. It is not denied that the Superintendent was satisfied with the work; he knew as well as the defendant whether it was done according to contract. The defendant does not complain of any collusion between the Superintendent and the contractor.

Our view of this branch of the case is, that after the work has been done to the satisfaction of the Superintendent, and the time allowed for making objections has elapsed, the charge against the property owner becomes fixed, and his liability to pay is as inevitable as though backed by a judgment of a Court of last resort. The law vests in the Board of Supervisors exclusive jurisdiction of all matters relating to the care and preservation of the streets. There is no appeal from the decision of the Board in such matters. Ample protection is afforded the property owner; he has the right to do the work himself, though the Board may direct how it shall be done. But after he has refused to avail himself of that privilege, and the city employs another to do it for him, it seems that if the city is satisfied with the work, he has no right to complain; he might himself have done it, and prevented all cause of complaint; it is his refusal to perform a public duty which affords the occasion of complaint. (See *Sanford v. Mayor, etc., of New York*, 33 Barbour, 150.)

The counsel assumes that the liability of the property owner to pay for street repairs arises out of contract, and argues that the Board of Supervisors cannot pass upon the facts necessary to charge him, because it is not possessed of judicial powers; that he is entitled to a trial by jury before he can be properly charged.

Our answer is, that the obligation of a property owner to keep the street in front of his property in repair, is not a contract in any sense. The law compels him to do it, and he receives nothing in return. It is a tax upon him for which his land is liable, as in the case of other taxes. His refusal to act is followed by a penalty. The Board of Supervisors, in respect of street contracts, is like the Board of Equalization — its action is final and conclusive. No jury trial was ever thought of in connection with its duties.

By the Court, SAWYER, J.

This appeal is from the judgment and the order denying motion for a new trial in an action to recover a street assessment in San Francisco. The point upon the constitutionality of the law under which the assessment was made, and the first point upon the regularity of the proceedings relied on by appellant, have been recently decided adversely to him in the case of *Emery v. San Francisco Gas Company*, 28 Cal. 345. The principles settled in that case must control this.

Evidence that a street contract was not performed according to the contract.

The second point, in respect to the regularity of the proceedings, is, that the Court erred in excluding the evidence offered by defendant to prove "facts showing that the work was not done in accordance with the contract, nor in accordance with said ordinance." The plaintiff, by the express terms of his contract, was to do and perform "the work under the direction, and to the satisfaction of the Superintendent." The complaint avers that the plaintiff "commenced said work and prosecuted the same, under the direction, and to the satisfaction of said Superintendent," until said work was completed, etc., and that he "fulfilled said contract to the satisfaction of the said Superintendent." Annexed to the agreement are "specifications," stating the particulars of the work, which are referred to and make a part of the contract.

The answer contains a general affirmative "averment, on information and belief, that the work performed by the plaintiff, and for which said assessment is alleged to have been made, was not completed in accordance with the specifications of the contract, nor in accordance with section third of chapter fourth of the order of the Board of Supervisors in relation to streets and sidewalks." There is no complaint that the contract itself did not require the work to be done in conformity with the requirements of said section three, chapter four, of said order. The pleadings are verified, and the allegations of the complaint not specifically denied must, under the provisions of the Practice Act, be taken as admitted. There being no specific denial of the allegation on the point, it is admitted that the contract was performed "to the satisfaction of the Superintendent;" and this is according to the terms of the contract, and the law under which it was made. (Laws 1862, p. 394, Sec. 7.) The question is, whether the plaintiff is entitled to introduce evidence to prove that the work was not done according to "the specifications of the contract," notwithstanding the contract was fulfilled "to the satisfaction of the Superintendent."

The law makes the Superintendent of Public Streets, acting under the direction of, and in subordination to, the Board of Supervisors, the official agent of the city for the purpose of contracting for street improvements, and for directing the performance of the work, and determining whether or not it has been performed according to the terms of the contract. He is the agent of the city for approving and accepting the work, when performed, as well as for making the contract, and he acts under the sanction of his official responsibility. His acceptance of the work is, in contemplation of law, the acceptance of the city.

The officers alone must determine whether the contract has been properly performed.

The work—as we held in *Emery v. The San Francisco Gas Company*, 28 Cal. 345—is a public work, undertaken by and

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on behalf of the public, and the public and not the adjoining property holder is, through the Superintendent, the contracting party. The public controls the street as well as the work. It is the public interest that is especially consulted. The municipal government through its officers determines what improvements shall be made, when and how, and with what materials they shall be constructed; and it is for the officers having these matters in charge to determine whether the work has been executed according to the plans adopted, and the contracts entered into, in pursuance of the orders of the local government. The lot holder, except as one of the public, is in no sense a party to the transaction. When the work is accomplished, for the purpose of defraying the expense, the municipal authorities levy an assessment upon the adjoining lands, by virtue of the sovereign right of taxation delegated by the Legislature of the State to the local government for that purpose, and collect it through the contractor himself. The owner of the adjoining lot has nothing to say about it, provided there is no fatal informality in the proceedings, except so far as his wishes are consulted in the first instance, as to whether or not the municipal authorities shall undertake the work, and so far as he is heard through his representative in the Board of Supervisors. The city makes no contract for him individually. The liability arises out of no agreement, express or implied, between him, in his individual character, and the street contractor. He simply pays because the burden has been imposed upon him in common with other citizens, and he cannot help himself, as he pays any other common public burden imposed under the sovereign power of taxation. He can only question the regularity of the proceeding resulting in the assessment, in the same manner, and upon the same principles, as the validity of a tax may be questioned. His liability is not a debt in any other sense than any other public burden imposed upon him under the same sovereign power is a debt. The only thing for the contractor to look to, is, to see that the proceedings are all regular. The prior proceedings being regular, and a valid contract having been made,

the law devolves upon the Superintendent the duty of supervising the work, and determining on behalf of the public whether the contract has been fulfilled, subject to review by the Supervisors on appeal; and when those officers have determined that question, and no fraud has intervened, that is the end of the matter. The act of examining, approving and accepting the work requires the exercise of judgment and is, in that respect, of a judicial nature. (*Parks v. Boston*, 6 Pick. 225; *Miller v. Board Sup. Sacramento Co.*, 25 Cal. 97.) Yet these particular duties are not such as are usually devolved upon Courts of justice. Although they partake of a judicial nature, they are a part of those duties, in the aggregate of a mixed character, which are always imposed upon the executive and legislative officers of local governments. (*People v. El Dorado Co.*, 8 Cal. 61, 62; *Stone v. Atkins*, 24 Cal. 127.) If the proceedings are regular, so that the proper officers have jurisdiction to act, and they exercise their judgment upon the matters committed to their care in the several steps of the proceedings, their determinations are valid, and can only be reviewed in the mode appointed by law. In this class of cases the law requires the contract to provide that the work shall be done to the satisfaction of the Superintendent of Streets. It devolves upon that officer, in the first instance, the duty of determining whether the work has been performed in accordance with the contract. Although the public in its corporate capacity is the party to the contract, yet, the law is not unmindful of the subordinate interest of the lot holders upon whom the cost of the work is to be in part assessed; and lest he should suffer from the errors of the Street Superintendent, sections four, nine and twelve authorize him to appeal to the Board of Supervisors, where he can specify his grievances in a petition, and "said petition or remonstrance shall be passed upon by the said Board of Supervisors, and their decision thereon shall be final and conclusive." (Laws 1862, p. 392.) An error of the Superintendent in the respect complained of can be corrected on appeal under sections four and nine, if not under section twelve. This conclu

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sive determination on appeal doubtless refers to those matters upon which the Superintendent is required in the discharge of his duties to exercise his judgment — those matters in which his errors are to be revised and corrected. There are acts to be performed of a jurisdictional character essential to the validity of any assessment. It is not to be supposed that the conclusiveness of the decision of the Board of Supervisors is to extend to that class of acts. The provisions in section twelve indicate the kind of errors upon which the decisions of the Board are to be final. It is that "all the decisions and determinations of said Board, upon notice and hearing aforesaid, shall be final and conclusive upon all persons entitled to an appeal under the provisions of this section, as to all errors and irregularities which said Board could have avoided."

Now this would not include jurisdictional acts, which it would be too late to remedy after the time for appeal had arrived. But an error in determining whether the contract has been in all respects performed is not one of the jurisdictional defects that could not be remedied. The power to direct the improvement of streets, and to make or authorize the making of contracts therefor, is properly vested in the Board of Supervisors, and it would seem to follow necessarily, that the authority to ultimately determine whether or not the contract has been fulfilled should be vested in the same body that has the power to order and make the contracts. We can see no valid objection to lodging this authority in that body, and, in the absence of fraud, making its determination final.

In this case, the contract is admitted by the pleadings to have been performed to the satisfaction of the Superintendent. It was a duty devolved upon that officer to determine that question of fact, and he did determine it. There is no fraud charged — nothing but an error in judgment. The law afforded the defendant a remedy in the regular course of the proceeding itself, by which he might have had the error reviewed, and the defect, if any, remedied. He did not avail himself of the remedy, but declined to appeal, and now seeks to review the determination of the Superintendent collaterally. We think,

by this neglect to appeal, he has acquiesced in the approval of the work by the Superintendent, and that his determination is conclusive. The principles applicable to the review of assessments of other taxes would apply here, and such would be the result in respect to ordinary taxes for State, county and municipal purposes, (*Conlin v. Seamen*, 22 Cal. 549; *City of Peoria v. Kidder*, 26 Ill. 358; *Aldrich v. Cheshire R. R. Co.* 1 Foster, 361; *Hughes v. Kline*, 30 Pa. St. R. 230, 231; *Somaford v. Mayor of New York*, 33 Barb. 150; *City of Lowell v. Hadley*, 8 Met. 194; *Williams v. Holden*, 4 Wend. 227, 228; *Banton v. Neilson*, 3 John. 475, 476; *Windsor v. Field*, 1 Conn. 284.)

Appeal to the Board of Supervisors from the decision of Superintendent.

It is said, however, that by section twelve the "warrant, assessment and diagram" are only made "*prima facie* evidence of the regularity and correctness of the assessment," etc., and by these very terms it is implied that the *prima facie* case may be controverted by other evidence. But this is not inconsistent with the idea that the decision of the proper officers is conclusive upon those matters which they are authorized to finally determine. The warrant, etc., are *prima facie* evidence that everything necessary to a valid assessment has been done. But certain jurisdictional acts may nevertheless be wanting—as for instance, no order for the improvement may have been made by the Board, and the contract might be wholly unauthorized. Such defects could doubtless be shown, for they lay at the very foundation of a valid assessment, as there would be no jurisdiction without them. But it is not sought to show the absence of any jurisdictional fact. "After the contractor of any street work has fulfilled his contract to the satisfaction of the Superintendent, or Board of Supervisors on appeal, the Superintendent shall make an assessment to cover the sum due," etc. (Sec. 9.) Now here the fact of the fulfilment of the contract to the satisfaction of the Superintendent, upon which his authority to make the assessment

depended, is admitted. It is not proposed by the evidence offered to controvert this fact, but only to show that this officer was too easily satisfied. But the law says, that the tribunal before which that showing must be made is the Board of Supervisors. No fraud is charged, and the proceedings all appear to be regular. By this construction, and by no other, the several provisions of the Act relating to the conclusiveness of the action of the Board, and the *prima facie* character of the "warrant, assessment and diagram" as evidence, can be harmonized, and all have effect. And it is a rule of construction that effect must, if possible, be given to every provision of a statute. We think the evidence was properly rejected.

The next point is substantially a re-statement in another form of the first, and requires no further notice.

Personal judgment against a defendant on a street contract.

The last point made, is, that the Court was not authorized by the statute to enter a personal judgment against the defendant. The contract was made under the Act of 1862. Sections ten and thirteen are cited, and an argument is based upon the language of those sections to show that the remedy of the contractor is limited to the enforcement of a lien upon the land charged with the assessment. But appellant entirely overlooks section seventeen, which in express terms provides that the owner shall also be personally liable. After stating who shall be deemed an owner within the meaning of the Act, it proceeds as follows: "And the person so defined to be the owner shall be personally liable for the payment of any charge or assessment lawfully made or assessed upon said lands, lots, or portion of lots, by said Superintendent, or contracted to be paid to the contractor for improvements, to cover the expenses of any work done under and authorized by the provisions of this Act." (Id. p. 400.) And section thirteen provides that, after a specified time, "the contractor or his assigns may sue, in his own name, the owner of the land, lots, or portion of lots assessed, on the day of the date of the recording of the warrant, assessment and diagrams, or

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any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining due and unpaid," etc. (Id. 399.) There can be no doubt that the Legislature intended to authorize the entry of a personal judgment as well as to adjudge a lien upon the premises assessed and to order a sale.

Judgment affirmed.

CURREY, J., dissenting.

This action was brought to recover a certain sum of money alleged to be due the plaintiff from the defendant. In November, 1862, the plaintiff entered into a contract with the Superintendent of Public Streets and Highways of the City of San Francisco to perform certain work and labor and provide the material therefor in the improvement of that portion of Folsom street which is between First and Second streets, in said city. The defendant's property, which adjoins the locality, was assessed to pay a portion of the price to be paid the plaintiff for the work, which the Superintendent accepted as performed, in the fulfilment of the contract, as provided by the Act of the Legislature relating to the subject, passed on the 25th of April, 1862. (Laws 1862, p. 391.) By his answer the defendant, among other things, averred that the work performed by the plaintiff, and for which the assessment was alleged to have been made, was not completed in accordance with the specifications of the contract, nor in accordance with section third of chapter fourth of the order of the Board of Supervisors in relation to streets, defining the manner of constructing streets and sidewalks, and the character and description of materials to be used in their construction.

At the trial, which was before the Court without a jury, the plaintiff submitted his case upon the pleadings. The defendant, to maintain his defense, among other things, introduced in evidence section third of chapter fourth of the ordi-

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nance referred to, and then produced three witnesses by whom he proposed to prove facts showing that the work was not done in accordance with the contract, nor in accordance with said ordinance. To this evidence the plaintiff objected on the ground that the same was inadmissible and incompetent, because the defense proposed to be proved could be made only by appeal to the Board of Supervisors, as provided in the Act of 1862. The Court sustained the objection, and the defendant excepted. The plaintiff obtained judgment and the defendant appealed.

There are several points presented by the appellant on which he seeks a reversal of the judgment. That relating to the competency of the evidence offered by him and excluded by the Court is the only one respecting which I deem it necessary to express an opinion.

The ninth section of the Act of 1862 provides that after the contractor of any street work has fulfilled his contract to the satisfaction of the Superintendent or Board of Supervisors on appeal, the Superintendent shall make an assessment to cover the sum due for the work performed, and specified in the contract, in conformity with the provisions of the Act, or with the decision or directions of the Board on appeal. The next section provides that the assessment made shall be attached to a warrant, to which shall be annexed a diagram exhibiting the locality of the work done, signed by the Superintendent and countersigned by the Auditor of the city and county, authorizing the contractor or his assigns to demand and receive the sum assessed. The warrant, assessment and diagram are required to be recorded, and when recorded, the amount assessed is made a lien on the land assessed, which is to continue for two years, unless sooner discharged. The twelfth section of the Act gives to the owner of any land so assessed the right to appeal to the Board of Supervisors from these acts and determinations of the Superintendent, and the Board is authorized to correct, alter or modify the assessment, and to direct the Superintendent to correct the warrant, assessment or diagram in any particular, or to make and issue a

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new warrant, assessment or diagram; and then it is declared that all the decisions and determinations of the Board shall be final and conclusive upon every person entitled to an appeal, as to all errors and irregularities which the Board could have remedied and avoided; and then it is further declared as follows: "The said warrant, assessment and diagram shall be held *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of said Superintendent, and of the regularity of all the acts and proceedings of the Board of Supervisors, upon which said warrant, assessment and diagram are based." The thirteenth section of the Act authorizes the contractor to sue in his own name the owner of the land assessed, at any time during the continuance of the lien of the assessment thereon, and to recover the amount of the assessment due and unpaid; and it is provided that the warrant, assessment and diagram, with affidavit of demand and non-payment, shall be *prima facie* evidence of such indebtedness and of the right of the plaintiff to recover in the action; and the Court in which such suit shall be commenced is empowered to adjudge and decree a lien against the premises assessed, and to order the same to be sold on execution.

The theory upon which it is sought to justify the exclusion of the evidence offered is, that the defendant had an opportunity, after the warrant was issued, to object by appeal to the Board of Supervisors, to the work, and to the contractor's right to collect the amount mentioned in the assessment, on the ground of non-performance of the contract; and that if upon such appeal it had appeared that the objection was well taken, the warrant, assessment and diagram would have been corrected by the Board, or suppressed, and new ones issued. But this theory does not admit that the defendant could controvert the plaintiff's right to recover anything whatever, nor does the statute seem to contemplate any such contingency as possible. The object of the statute, according to the construction given to it by the Court below, was to charge the defendant to the extent of the assessment affecting his prop-

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erty with all the burdens of the contract on the one part, without the privilege of resisting payment *in toto* because the plaintiff had not performed the contract on his part, when by the general law such performance was a condition precedent to his right to recover anything. It is also argued on the part of the plaintiff that if the work was done to the satisfaction of the Superintendent, and the time for appealing to the Board of Supervisors from his determination had elapsed, that then the charge against the owner of the premises became fixed, and his liability to pay the amount assessed was as absolute as if in judgment of a Court of last resort. There are several answers to this position, any one of which is sufficient for its refutation. The Act of 1862 does not give to the omission of the owner of premises assessed, to appeal to the Board of Supervisors such an effect, but it provides that said warrant, assessment and diagram shall be held *prima facie* evidence of the regularity and correctness of the assessment and of the proceedings and acts of the Superintendent and of the Board of Supervisors, upon which the warrant, assessment, and diagram are based; and in an action brought by the contractor against the owner of the assessed property, the warrant, assessment and diagram, with the affidavit of demand and non-payment, shall be *prima facie* evidence of such indebtedness, and the right of the plaintiff to recover in the action. What is to be understood by *prima facie* evidence? It is that evidence which is sufficient to establish the fact in issue in the first instance; which fact remains established until rebutted or disproved; but as the term itself imports, this species of evidence is not conclusive—it may be disputed and overcome by countervailing evidence. This was the kind of evidence on which the plaintiff relied to establish his right to recover, and it was competent for the defendant to prove that it was not true.

It is claimed, as already seen, that the defendant was bound by the combined action of the Superintendent of Streets and Board of Supervisors as by a judgment of a Court of competent jurisdiction. If so, by what authority could these municipi-

pal officers thus bind him? If it be said by authority of the statute, the answer to it is that there is a law higher than the statute. The Constitution of the State has provided in whom shall be reposed the judicial power, and the Board of Supervisors and Superintendent of Streets are not of these; besides which the Constitution provides that the right of trial by jury shall be secured to all, and remain inviolate forever, though this right may be waived by the parties in civil cases in the manner prescribed by law. But the Act of 1862 does not prescribe that this right may be waived, but provides in general terms that the contractor may have his action to recover the amount certified to be due him, and defines the evidence on which the plaintiff relied in the case as *prima facie* evidence of his right to recover. This statutory provision would have been idle and useless if to the acts and proceedings of the Superintendent of Streets and of the Board of Supervisors the consequences which are claimed for them were given. But the Act has not undertaken, in terms, to deprive the defendant of his right to be heard in his defense, in a Court of justice, proceeding under and in accordance with the Constitution; nor has it gone the length of giving to a contractor the right to recover against the owner of property supposed to be benefited by the improvement or work alleged to be done; the price specified by the contract, provided it can be shown by the defendant that the plaintiff has not rendered the consideration, on which his right to recover is made, by his contract under the law to depend.

My opinion is that the statute should be construed in support of the right of the citizen to a just defense for the preservation of his property; and believing that the ruling of the Court below, denying to the defendant the opportunity at the trial to make the defense which he proposed, was a denial of a constitutional right just in itself, I am constrained to dissent from the decision of a majority of this Court affirming the judgment.

RHODES, J., dissenting.

I am compelled to dissent from the opinion of my associates in this case, and will briefly state some of the grounds upon which I think the decision should be based.

The evidence offered by the defendant going to show a non-compliance by the contractor with the terms of the contract, was properly excluded, because the general allegation in the answer of non-performance of the contract, without any specification of the particulars wherein the failure consisted, did not entitle him to have the evidence admitted; but not because the performance "under the direction and to the satisfaction of the Superintendent" was conclusive upon the lot holders. The performance of the contract is the condition precedent to the making of the assessment and the issuing of the warrant, and although these may be made and issued upon a performance to the satisfaction of the Superintendent, yet when the assessment and diagram are made and the warrant issued, the law accords to them only the quality of being *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings, etc. If they are conclusive evidence, it was idle to declare them *prima facie* evidence. It cannot with propriety be said that they constitute *prima facie* evidence only when jurisdictional acts and matters are drawn in question, for in the absence of any legislative declaration that those documents shall constitute only *prima facie* evidence, no conceivable number of those or similar documents could amount to more than *prima facie* evidence of the jurisdictional facts upon which depended the authority of the city to order the proposed work to be done.

If the conclusive effect claimed for them is justly due, it would seem that the Legislature had put the contractor to the useless trouble of procuring the judgment of a Court, that the sum specified in the assessment and warrant is due when the same papers are conclusive evidence—and a judgment is no more—that the sum specified therein is due to the contractor.

The personal judgment against the lot holder I do not think can be sustained upon any constitutional theory. The seventeenth section of the Act of 1862, it is true, authorizes it; but in my opinion, the section is in conflict with some of the plainest constitutional provisions, that were designed for the protection of the citizen against the exercise of arbitrary and unrestricted power by the Government. A charge that is nominally cast upon property, but which, at the same time, is made to constitute a charge upon the person, cannot be disguised under the name of an assessment, for it is essentially a tax in the larger sense of that term. The cases treating of this matter, cited in *Emery v. San Francisco Gas Company*, hold an assessment, such as is mentioned in the thirty-seventh section of Article IV of the Constitution, providing for the organization of cities and towns, to be a charge imposed upon property to pay for certain works and improvements constructed in the immediate vicinity of such property, and which is supposed to receive some particular benefit over and above the general mass of property in the city by the construction of such improvements. Where a personal liability for the payment of the assessment is superadded, the assessment becomes, in effect, a charge upon all the property of the person who owns the property on which the assessment is nominally charged, and this is thus transformed into a tax in the sense of that term as used in the clause of the Constitution providing "that taxation shall be equal and uniform throughout the State." While working under the general system of taxation for State, county or city purposes, that provision controls and restrains every department of the Government—whether principal or subordinate—assuming to exercise the powers of taxation, and it cannot readily be conceived that a power so dangerous and peculiarly liable to abuse as that claimed for cities in levying assessments could have been granted to them. Under the constitutional restriction just cited, in levying taxes for State, county or city purposes, the authorities are limited to a tax of one hundred per cent upon the value of the property subject to the tax, while the city in

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levying and collecting the assessments under the Act of 1862, according to the construction claimed, may exhaust the whole property charged with the assessment, and if the lot holder is so unfortunate as to own a lot adjacent to an expensive improvement, he may, instead of realizing the benefits presumed by the law to accrue to his property find himself a hopeless bankrupt. In my opinion, the plaintiff is only entitled to judgment enforcing the lien.

CATHARINE FORDYCE AND BENSON B. FORDYCE
v. C. P. ELLIS, D. WOLDENBERGH, H. A. THOMP-
SON, AND EDWARD STOCKTON.

RELEASE OF LIABILITY OF SURETIES ON EXECUTOR'S BOND.—If, in an action against the executors of an estate, brought by the legatees to recover a judgment for money found to be in the hands of the executors, and adjudged to be paid to the legatees by the Probate Court, a judgment is entered by consent of the parties under a stipulation in writing, and made a part of the judgment, payable in installments thereafter, the sureties, not consenting to the arrangement, are released from their liability on the executor's bond.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

In August, 1859, J. M. Fordyce died in Placer County, leaving a will by which he bequeathed to plaintiffs his property. W. W. Sheldon and Francis Clark were nominated executors in the will, the same was probated, and the executors gave bond and entered upon the discharge of the duties of their trust. The defendants in this action were sureties on the bond.

On the 29th day of December, 1860, on a settlement of the final account of the executors, the Probate Court found in their hands five thousand eight hundred and forty-six dollars and seven cents, and made a decree directing them to pay the same to plaintiffs.

On the 15th of March, 1861, the plaintiffs sued the executors in the District Court of Placer County to recover said sum,

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and on the seventh day of November thereafter, judgment was rendered in the action in accordance with the stipulation mentioned in the opinion of the Court. The defendants in this action were not parties to the stipulation, and did not consent to the same.

On the 19th of May, 1862, the plaintiffs commenced this action to recover a balance of four thousand and forty-six dollars, alleged to be due from the executors on the judgment recovered against them.

The Court below gave judgment for the defendants, and plaintiffs appealed.

H. H. Hartley, for Appellants.

The failure to sue the principal, or dismissing suit already commenced, will not discharge the security. (2 American Leading Cases, third edition, 1852, pp. 255, 256, notes and cases referred to; Id. 305-7, and cases referred to.)

Nor will a promise to give time, not founded upon a consideration deemed valuable in law, discharge the surety. This is too well settled to need comment. The case referred to and relied upon by respondents decides this point. (See *Norton v. Williams & Roberts*, 4 Monroe, 493, 494.) To make the giving of time a discharge, the consideration must be a valuable one, either of benefit to the creditor or detriment to the principal debtor. If the consideration is something that the creditor was by law entitled to, then there is no consideration. If the consideration be a part payment of the debt after it became due, then the promise is without consideration and void, he being entitled not only to part, but to the whole of the debt. (*Peabody v. King*, 12 Johns. Reps. 426; *Reynolds v. Wade*, 5 Wendell, 501; *Jenkins v. Clark*, 7 Ohio, 72; *The Farmers' Bank of Canton v. Reynolds*, 13 Ohio; *McCann v. Lamott*, 4 English; Chitty on Bills, 413, and note; 2 Black. 118; Story on Notes, 415; 12 Wheat. 554; Burge on Suretyship, 204; 4 Bing. 717; 18 English Common Law, 545.) If,

then, the only consideration in this case is the extension of the time, then the promise is without consideration, and void.

The judgment that was rendered in the cause of *Fordyce v. Clark & Sheldon*, was entire and indivisible, and any execution that issued thereon must have conformed to the same, and could not have been issued in parts or for a portion of the judgment, but must be for the whole, although the plaintiff might have directed the officer to proceed for only a part satisfaction; consequently, the stipulation entered into could have had no effect on the judgment or the execution that might issue thereon. Had the same been entered in the form of a decree in chancery, requiring acts to be done at stated times, and in default of performance, then for a final or compulsory process to issue, thus a case would be presented and different rights would arise—then there would have been matters of record binding upon the parties, and if the securities were prejudiced, they would have been discharged.

Robert C. Clark, for Respondents.

By the Court, SHAFTER, J.

This is an action against the defendants as sureties to a bond given on behalf of W. W. Sheldon, executor of the last will and testament of John M. Fordyce. The appeal is from the judgment, and the only question is, whether the findings coupled with the admissions contained in the answer, support the judgment.

The plaintiffs were residuary legatees in the will of Fordyce. The will was duly probated, and afterwards, on the 29th of December, 1860, there was found, in due course of proceedings, to be in the hands of Sheldon and his co-executor, Ellis, the sum of five thousand eight hundred and forty-six dollars and seven cents, which amount, by the decree of the Probate Court, then made, the executors were directed to pay to the plaintiffs, according to the terms and requirements of the will.

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The plaintiffs, in March, 1861, instituted a suit against the executors to recover the said five thousand eight hundred and forty-six dollars and seven cents, and on the 7th of November of the same year judgment was entered for the plaintiffs, "on their motion and by consent of defendants," for five thousand five hundred and forty-six dollars and seven cents and costs, "in pursuance of the terms" of a stipulation, which was itself "entered of record in full as an order of Court in said cause." The stipulation was as follows:

"Catharine Fordyce et al. v. Francis Clark and W. W. Sheldon.—Whereas, the said defendants have this day consented to the entry and rendition of judgment against them for the sum of five thousand five hundred and forty-six dollars and seven cents damages, and one hundred dollars and fifty-five cents costs of suit; now, therefore, plaintiffs promise and agree that if defendants pay to plaintiffs at this date the sum of five hundred dollars, and the sum of five hundred dollars per month on the sixth day of each month thereafter, until the whole of said judgment be paid and satisfied, that they will not issue execution to enforce said judgment or any part thereof; and that plaintiffs will at no time issue execution for a greater sum than for such monthly instalments as shall become due and be unpaid at the time of issuing execution, and this stipulation may be entered as an order of Court."

It further appears that Clark and Sheldon paid to the plaintiffs the first five hundred dollars on the day the judgment was entered, as provided in the stipulation and the order made thereon.

There is no error in the judgment. It may be conceded that the stipulation for an extension of time for the payment of the sum sued for, does not disclose a contract binding upon the plaintiffs, for the reason that the contract was without consideration. But the stipulation was made an order of Court; and, furthermore, the judgment appears to have been entered in pursuance of the terms of the stipulation. If the stipulation did not impede the sureties in their remedies, both

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the order and the judgment did. If it appeared that the remedies of the sureties were not diminished by the record made up in the action, not by law, but by concert between the parties, and much more if it appeared by their record arrangement that the remedies of the sureties were in fact accelerated, then and in that event the liability of the sureties would probably continue as is insisted by the appellants. (*Hulme v. Coles*, 2 Sum. 12; *Stevenson v. Roche*, 9 B. & C. 707; 4 Man. and Ry., 561; *Hallet v. Holmes*, 18 John. 28; *Pierce v. Edmonds*, 10 B. & C. 57.) But if the facts showing that the arrangement was not and could not have been prejudicial to the defendants did not lie, or were not to be found in the rules by which judicial proceedings are governed, they were to be made out by evidence, and the burden of proof was clearly upon the plaintiffs. But no such facts appear in any manner. The record shows that the plaintiffs were entitled to a certain sum of money out of the estate of Fordyce by force of the will and a probate decree; that a suit was brought against the executors for the amount, and that an order and judgment, each fashioned after the stipulation of parties, were entered in the action, providing for payment by instalments of the amount recovered — the first instalment to be paid presently, and the others at intervals of thirty days. It does not appear that the defendants in the action had either answered or demurred; nor does it appear that they had any just pretense for doing either. Assuming that the allegations of the complaint filed by the plaintiffs were true, and that they were entitled to the relief which they prayed, and that the complaint was properly drawn, all idea of defense and delay as consequent upon it is of course precluded. According to the course of the Court, on a case so conditioned, judgment was presently due, and might have been had for the asking; for we cannot intend that there would have been any merely factious opposition. A judgment having been entered, execution for the whole amount could have been claimed immediately thereafter, and the sureties by paying the judgment might at once have claimed their well understood equi-

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table remedies, which remedies it is to be presumed the plaintiffs would have promptly aided by just co-operation on their part.

Such would have been the position, presumptively, of the sureties, had the action against the executors been left to the settled rules of procedure. But by the conventional judgment and order entered in the action, the remedies of the sureties were delayed and made to wait upon contingencies to which they had never assented and about which they had never been consulted.

Judgment affirmed.

Mr. Justice CURREY having been counsel in the Court below, did not participate in the decision.

**IN THE MATTER OF THE ESTATE OF WILLIAM H. ORR,
DECEASED.**

SALE OF HOMESTEAD BY PROBATE COURT.—The Probate Court cannot make an order for the sale of the homestead to pay debts of the deceased, even if the debts are secured by a valid mortgage on the same.

HOMESTEAD NOT A PART OF ASSETS OF ESTATE.—It is the duty of the Probate Court to set apart the homestead for the use of the family of the deceased, and when set apart it ceases to be a part of the assets of the estate.

ENFORCEMENT OF LIEN ON HOMESTEAD.—Valid liens existing on the homestead, created before the death of the head of the family, must be enforced in the District Court.

APPEAL from the Probate Court, Placer County.

On the 27th day of September, 1862, William H. Orr, and C. M. Orr, his wife, executed to C. A. Brown a mortgage on a tract of land they resided on to secure the payment of the sum of one thousand eight hundred dollars. July 22d, 1863, Orr made and recorded a declaration of homestead on the land so mortgaged to Brown. On the 8th day of November, 1863, Orr died intestate, leaving him surviving his wife and two infant children. December 20th, 1864, Brown, the mortgagee, was appointed administrator of the estate, and qualified

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and entered upon the discharge of the duties of his trust. January 28th, 1865, Brown's claim was allowed against the estate, and he filed a petition in the Probate Court praying for a sale of the mortgaged property for the payment of his debt and the expense of administration. The surviving wife appeared, and resisted the sale on the ground that it was the homestead of the family. The Probate Court denied the prayer of the petition and the petitioner appealed.

Jo. Hamilton, for Appellant.

The declaration of homestead was not made until after the mortgage was duly made. It was the same then as if no homestead declaration had been made at all. The estate came to the hands of the administrator charged with the mortgage. The estate of the deceased rests in the administrator for the benefit of the heirs, subject to the lien of the creditor. (Act 1862, p. 519; *Curtis v. Sutter*, 15 Cal. 239; *Updegraph v. Trask*, 18 Cal. 438.)

We hold that the Court had the power, and it was the duty of the Probate Judge to grant the prayer of the petition. The Court erred in the judgment and decree setting aside the property mortgaged to us as a homestead to the respondents. The mortgage was of an older date than the declaration of homestead. The declarant could not dedicate the property as a homestead so as to divest the rights of the mortgagee.

Hale & Fellows, for Respondent.

The order of the Probate Court denying the petition was proper, because the property in question constituted the homestead of respondent. (Belk. Prob. Law, 2d Ed., Secs. 120, 121, 124; Stat. 1860, p. 331; Stat. 1862, p. 519.)

It would seem to be the duty of the administrator to include in his inventory the homestead of the surviving wife in even such a case as this, because it was a part of the estate of the deceased, (see Belk. Prob. Law, Secs. 105 and 107;) but not

for the purpose of subjecting it generally or specially to the payment of debts, but for the sole purpose of *protecting* (not creating) the rights of the survivor thereto as a homestead. (Ib. Secs. 120, 121, 125.)

There is another and conclusive reason why appellant's petition for sale (upon the ascertained facts of this case) could not have been legally granted, viz: It, the property, was no part of the estate of W. H. Orr, deceased, within the meaning of that part of the probate law authorizing the sale of real property by the administrator under the order of the Probate Court. (See Belk. Prob. Law, 2d. Ed., Secs. 148, 149, 150, 154, 155, 156, 163, 186.)

By the Court, SANDERSON, C. J.

The order of the Court refusing to direct a sale of the homestead for the purpose of satisfying the alleged mortgage claim of C. A. Brown, is not erroneous. Section four of the Homestead Act (Statutes 1862, p. 519,) provides that "the homestead property shall, upon the death of the husband or wife, vest absolutely in the survivor and be held by the survivor as fully and amply as the same was held by them, or either of them, immediately preceding the death of the deceased, and shall not be subject to the payment of any debt or liability contracted by or existing against the said husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such debt or liability as the homestead was subject to at the time of the death of such husband or wife." Thus the homestead can be sold, after the death of such husband or wife, under legal process, only in such cases as it could have been sold during the lifetime of the deceased. Those cases are specified in the second section of the same Act, and are confined to mechanic's, laborer's, vendor's and mortgage liens lawfully obtained. In harmony with these provisions of the Homestead Act, the one hundred and twenty-first section of the Probate Act directs the Probate Court to set apart from the assets of the estate the homestead

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property for the use of the family of deceased; and the one hundred and twenty-fifth section provides that such homestead property when so set apart shall be the property of the widow if there is no minor child, or, if there is a minor child, one half shall belong to the widow and the other half shall belong to such minor child, or, if there be more than one minor child, then to such minor children in equal shares. When the homestead has thus been set apart it ceases to be a part of the assets of the estate, and neither the Court nor the administrator has any further power over it, and it has become for all future purposes of the administration as if it had never existed. It is true that the widow, or widow and minor child or children, as the case may be, take it subject to all valid liens existing against it at the time of the death of the husband, but free from all other claims. If, therefore, at the death of Orr, Brown held a valid mortgage against the homestead, the widow took the homestead subject to it, and Brown can now, as before the death of the husband, subject it to the satisfaction of the mortgage debt, but his remedy is in the District Court. (*Fallon v. Butler*, 21 Cal. 24; *Willis v. Farley*, 24 Cal. 490.)

Order affirmed.

HENRY W. SEALE v. THOMAS FORD AND GEORGE GORDON *et als*.

CONFIRMED SURVEY OF MEXICAN GRANT.—The confirmed survey of a confirmed Mexican grant of land has the same effect and validity as if a patent for the land surveyed had been issued by the United States.

TITLE ACQUIRED BY CONFIRMED SURVEY OF MEXICAN GRANT.—The confirmed survey of a confirmed Mexican grant of land gives to the confirmer a title which cannot be defeated by an older Mexican grant of a specific quantity within larger boundaries, embracing both, the survey of which has not been finally confirmed.

CONFLICT BETWEEN TWO MEXICAN GRANTS.—If the plaintiff has title under a confirmed survey of a confirmed Mexican grant, and the defendant under an unconfirmed survey of a confirmed grant, which he claims to be a perfect grant, the burden of showing a perfect grant rests on the defendant.

IMPORT OF WORDS "GRANT" AND "SEIZED IN FEE."—The words "grant" and "seized in fee," as used in the stipulation of counsel, admitting certain facts for the purposes of the trial, filed in this case, do not, *ex vi termini*,

Argument for Respondent.

import a perfect grant with specific boundaries in favor of defendant's grantor, or that the grantee in said grant received juridical possession from the Mexican Government.

TRANSFER OF CASE BY AMENDED CONSTITUTION.—When a trial was commenced and the testimony taken by a Judge before his term expired under the old Constitution, and he was re-elected; *Held*, that as a Judge under the new Constitution, he could decide the case on the evidence then taken, without a re-submission.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The cause was tried in September, 1863, by the Court, without a jury. The decision was made and judgment filed January 13th, 1864.

The other facts are stated in the opinion of the Court.

A. & H. C. Campbell, for Appellants.

It is admitted that the Rancho San Francisquito has been finally confirmed to Rodriguez, who claimed the same under a grant thereof made by the Mexican Government of California to her husband, Buelna; that defendant Gordon is seized in fee as owner of said rancho, under that title; that said grant bears date May 1st, 1839; that the grant under which plaintiff claims bears date February 16th, 1841. There is no reservation or restriction in the terms used. Confirmed claims by *grant*, and Gordon *owns in fee* under that title.

When it is admitted that the Mexican Government granted this San Francisquito Ranch to Gordon's grantor, and that that grant is senior to plaintiff's, it only remains to show that the land is within that grant. Defendants show a perfect grant; nothing less can grant the land. Something inchoate may give an equity; nothing less can give the admitted title in fee.

S. O. Houghton, for Respondent.

It is contended that the admission that Gordon is the owner in fee of the Rancho San Francisquito Palo Alto, admits that he has a perfect title thereto. Assuming for the purposes of the argument that such is its effect, the position of the defendant is no better than though no such admission had been made, for it does not relieve the defendants from the necessity

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of showing that the lands in question are a part of that rancho. Upon that point they have made no proof — they have neither produced their grant for that purpose, nor have they shown a final survey by authority of the United States. On the contrary, it appears from the record that it is an unlocated claim, now pending and undetermined before the Federal Courts.

By the Court, SAWYER, J.

This is an action to recover certain lands in Santa Clara County, and the contest arises out of an apparent conflict of boundaries between two adjoining ranchos granted by the Mexican Government — one, called Rancho Rinconada y Arroyo de San Francisquito, to Maria Antonio Mesa, in 1841; and the other, called Rancho San Francisquito Palo Alto, to Antonio Buelna in 1839. Both grants have been confirmed. The plaintiff is admitted to be the owner of an undivided half of the former, and the defendant Gordon, the owner of the latter by titles derived from the respective confirmees. The survey of the former has been made, and finally confirmed, by the Supreme Court of the United States. The survey of the latter has been made, and upon the proper order returned into the District Court of the United States for the Northern District of California, for examination, where it is now pending and undetermined. The land in dispute is embraced in both of said surveys. The plaintiff having recovered, a motion for new trial was made and denied, and defendants appeal from the order denying a new trial, and from the judgment.

The principal ground of appeal is, that the evidence is insufficient to support the findings.

Confirmation of a final survey of a Mexican grant.

The plaintiff's survey having been finally confirmed, it has, under the Act of Congress of 1860, "the same effect and validity as if a patent for the land surveyed had been issued by the United States," and the respondent stands in the same position as he would if he had his patent. He has, therefore,

made out a title which can only be defeated by an older grant from the Mexican Government which actually covers the same lands. And the older title must be a "perfect title," that did not require presentation to, and confirmation by, the Board of Land Commissioners; or, at least, it must be under a grant by specific boundaries, which could not be modified by the Government of the United States; and not a grant of a specific quantity within larger boundaries. (*Waterman v. Smith*, 13 Cal. 407-22, and cases there cited.)

Inchoate and perfect titles under a Mexican grant.

The burden of showing superior title from a paramount source of proprietorship was on the defendants. It was stipulated that the Rancho San Francisquito has been finally confirmed "to Maria Concepcion Valencia de Rodriguez, who claimed the same under a grant thereof made by said Mexican Government;" and that George Gordon was, at the time of the commencement of this suit, "seized in fee of said rancho, by title derived from said confirmer," but it is not stipulated that said grant was formally located by the Mexican Government, or, if so, where.

It is insisted by appellant that the stipulation, that the confirmer "claimed by grant," and that Gordon was "seized in fee" by title derived from the confirmer, necessarily imports, *ex vi termini*, that defendant Gordon holds, under what has been denominated in our legal proceedings a "perfect title" — that in contemplation of law there could be no "grant," and Gordon could not be "seized in fee" unless there was a perfect title; and that under the decision in *Minturn v. Brower*, 24 Cal. 644, the confirmation of the survey under the plaintiff's grant cannot affect defendant's perfect title under his prior grant. But the term grant, as almost universally used in California, both in legal proceedings and common parlance, does not, necessarily, have this signification. It is a matter of public notoriety, and a part of the general history of the country, of which the Courts can take notice, that there are, in the whole State of California, but very few of that class of Mexi-

can titles, which have sometimes been called "perfect titles." The term grant has not only been universally used by the people to designate all concessions of the Mexican Government, whether inchoate and requiring the action of the United States Government to perfect the titles under them, or perfect vesting a complete title, which cannot be disturbed; but such use of the term has also been so general in legal proceedings as to have acquired this comprehensive signification in the legal language of the State. The word is often used in this comprehensive sense in *Waterman v. Smith*, before cited, and other cases of a similar character. Nor does the admission that Gordon was "seized in fee," in the connection in which it stands, necessarily, or by fair construction, import that there was a perfect title. The admission is that he was "seized in fee as owner of said rancho"—not of the lands in dispute—without attempting to locate the rancho. That was left for other proofs. The fair construction, when taken in connection with the context, is, that Gordon had acquired the title granted to Buelna, and subsequently confirmed to his widow, and the location of the grant was the question reserved to be contested in the action. It is manifest that the respondent did not use the terms of the stipulation in the sense claimed for them by the appellant, for that would be to stipulate away the very point, and the only point, in controversy; nor would the Court be justified in giving them that construction. In our opinion, proof other than that contained in the language of the stipulation is necessary to show that the defendants hold a "perfect title." Appellants also claim that the fact of juridical possession of the grantee of the Mexican Government, under whom they claim, is admitted, and that no proof is required on that point. There is no express admission in the record that juridical possession was given to Buelna. Appellants must suppose that the admission of this fact is implied in the word "grant," and the admission that Gordon was seized, upon their theory that these terms necessarily, in law, mean nothing less than a "perfect title," for the reason that "juridical possession" is an essential element in a "per-

fect title." But as their construction of the stipulated facts in this respect cannot be maintained, it follows that this implication fails; and there is nothing else in the record from which the admission can be inferred. This brings us to the question as to whether the evidence is clearly sufficient to require a finding that there was a "perfect title." No grant of any kind, and no document constituting any part of a perfect title under the Mexican Government, is in the record. We have, therefore, no means of knowing whether the title was inchoate or perfect. Nor is there anything in the record by which we can determine whether or not the grant was of lands with determinate, specific boundaries, or a grant of a certain quantity within larger boundaries, which might be located by the Government at different points. We cannot say, therefore, that the findings are not fully supported by the evidence. There is nothing in the record to connect any of the defendants except Gordon with the Buelna grant.

Effect of amendment to the Constitution on causes pending in District Court.

The only remaining point requiring notice, is, that the trial having been commenced in the old Court, and the decision not having been rendered until after the new Court, under the amended Constitution, superseded the old, the Hon. S. B. McKee, before whom the trial was commenced, and who was elected Judge of the new Court, had no authority, without a re-submission of the case, to decide it upon the evidence taken by him as judge of the old Court. All cases pending on the first day of January were by law transferred to the new Courts, and it is provided "that they shall be heard, tried and determined therein in the same manner as if originally brought on in such District Courts." We think the new Court properly took up the case at that stage of the proceeding, which had been reached at the time of the transfer. The testimony was taken in the regular course of the proceedings, and the Judge who was re-elected was just as much judicially informed of the testimony as he was of any of the other proceedings in the

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case which took place prior to the transfer, and he went on in the new Court from the point attained at the time of the transfer, and "determined" the case "therein in the same manner as if originally brought on in such District Court." But however this may be, no objection to his proceedings was taken in the Court below, before the decision, or on motion for new trial, and the parties must be deemed to have acquiesced in his proceeding with the case on the testimony already submitted. It is not a case of total want of jurisdiction. The objection is purely technical, and cannot be raised in this Court for the first time.

It results from the views expressed that the judgment must be affirmed, and it is so ordered.

By the Court, SAWYER, J., on rehearing.

Upon a further examination of this case, aided by the argument of counsel upon the rehearing, we find nothing to shake our confidence in the correctness of the conclusions before attained. Appellant claims that the stipulation that Gordon "was seized in fee" of the Rancho San Francisquito necessarily imports that he had a perfect title, and for this reason the Court gave a wrong construction to the stipulation. But the same stipulation says that respondent was "seized in fee" of an undivided half of Rancho Rinconada, and that the survey of this grant has been finally confirmed by the Supreme Court of the United States, while the survey of the appellant's grant is still in dispute and pending before the District Court of the United States. Upon the construction claimed by appellants, if both grants actually cover the same land, it is stipulated that both parties are seized in fee of the same land under adverse grants, which is impossible. Manifestly the intention of the parties was to stipulate that each party had acquired all the interest of the original grantees of the Mexican Government in the respective ranchos without any agreement as to whether the grants were perfect or inchoate. No other reasonable construction can be given to the stipulation, and

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the subsequent action of the parties on the trial harmonizes with this view. The District Court did not find a perfect grant, and, in our judgment, the evidence in the record does not justify us in holding that there was one. As the appellant does not appear to hold under a perfect grant, the confirmed survey of the respondent must prevail.

But again, we find no evidence in the record showing that the lands in controversy are within the grant under which the appellants claim, whether perfect or inchoate. The grant itself is not in the record, nor are the boundaries called for by the grant shown. There is testimony tending to show what land Buelna went into possession of, and what land was measured off to him by the Mexican officer; but whether it was in fact within the calls of the grant or not is not shown. The evidence on the subject consists of depositions taken before the Board of Land Commissioners, and has no reference whatever to the plats filed in the case, which were made by the Surveyor-General long after the depositions were taken; and there is no connection whatever shown between the plats and the depositions. They are wholly independent pieces of evidence. The plat of itself proves nothing, because it is the plat of a survey still unconfirmed, and the land may yet be located somewhere else. And as there is nothing to connect the plats with the depositions read in evidence, the depositions and plats do not illustrate each other. We find nothing in the record showing that the land spoken of in the several depositions includes the land in dispute, or even the land embraced in the plats on file. The testimony on this point is insufficient to justify us in disturbing the finding.

Judgment and order affirmed.

Argument for Appellant.

THE SAN FRANCISCO AND SAN JOSE RAILROAD
COMPANY v. DAVID MAHONEY AND JAMES G.
DENNISTON *et als.*

APPEAL IN PROCEEDING TO CONDEMN LANDS.—An appeal lies from a judgment in a proceeding to condemn lands to the use of a corporation, and from an order granting or refusing a new trial after judgment in such proceeding.

TIME OF ASSESSING VALUE OF LAND CONDEMNED.—In a proceeding to condemn land for the use of a railroad corporation, the owner is entitled to receive the value of his land as assessed at the time when, in the language of the Constitution, the land is "taken." This time is not when the plat of survey is filed with the Secretary of State, nor when the company enters for the purpose of construction.

POWER OF COMMISSIONERS APPOINTED TO APPRAISE LAND.—Commissioners appointed to appraise land to be taken for the use of a railroad company have no power to pass upon any question of title, or to make any apportionment of the money assessed for the value among the owners.

WHEN TITLE TO LAND CONDEMNED FOR RAILROAD IS CONTINGENT.—If the title of the claimants to land over which a railroad passes is dependent on a confirmation of a survey of a Mexican grant by the United States, the location of which may be changed, the money for the assessed value of the land should be paid into Court and remain there until the title is settled.

PERSONS ENTITLED TO COMPENSATION FOR LAND CONDEMNED FOR PUBLIC USE.
—Parties claiming compensation for value of land condemned for railroad purposes must be owners of the land taken, or have an interest therein.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Plaintiff appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

Charles N. Fox, for Appellant.

The fair market value, at the time of the taking, should be the measure of damages. (*Pierce on American Railways*, 203.) And this, according to the same author, is to be reduced by resulting benefits, or not, according to the provisions of the local statute under which the award is made.

The case of *Bensley v. Mountain Lake Co.*, 13 Cal. 306, relied upon by the defendants upon this proposition, is not in point. That is a case where the award had been made and decree entered, and the award remained unpaid for four years, at the expiration of which time the plaintiff in that proceeding

Argument for Appellant.

sought to take possession and pay only the amount awarded four years before. The Court very properly said that the award should have been paid before, and since it was not, the increased value should be paid.

What is "the time of taking?" Defendants say that it is the time of making the award or payment; and it is upon this that they base their claim to recover the present value of the land. In this we think they are wrong. The statute, as amended, (Stat. 1863, p. 614, Sec. 34,) especially provides for the taking of the land at the time of the commencement of the proceedings. These proceedings may be delayed, without any fault of plaintiff, for years; and if defendant's theory is correct, the longer he could delay them, the more he would gain by it, thus permitting him to take advantage of his own wrong.

In this State, a railroad company is required to file a plat of the location of its road with the Secretary of State, and in the office of the Clerk of the county. (Stat. 1861, p. 623, Sec. 42.) In Massachusetts, this plat has to be filed with the County Commissioners, and the filing of the plat is held to be the "taking of the land." (*Charleston Br. R. R. Co. v. County Commissioners*, 7 Met. 78; *Boynton v. Peterborough and Shirley R. R. Co.*, 4 Cush. 467; *Boston and Providence R. R. Co. v. Midland R. R. Co.* 1 Gray, 361; *Haven v. Boston and Maine R. R. Co.* 2 Gray, 575.) The same rule should apply here; but in this case we have been more liberal, and conceded that the taking was in point of time identical with actual entry upon the land for the purposes of construction.

This Court has already decided that in these proceedings the Commissioners have nothing to do with the question of ownership in the land, and no power to determine who shall receive the award. (*Spring Valley Waterworks v. San Francisco et al.* 22 Cal. 434.) In this case, though there was no evidence upon the subject, the Commissioners have passed upon that question and distributed their award.

Argument for Respondents.

Sharp & Tompkins, and T. I. Bergen, for Respondents.

The award of the Commissioners is a statute award, and like all awards can only be vacated for errors of law or fact appearing upon its face, or corruption, irregularity, or unfairness in the procurement thereof. (*Carsley v. Lindsay*, 14 Cal. 390; *Tyson v. Wells*, 2 Cal. 122; *Muldrow v. Norris*, 2 Cal. 74.) The opinion of the Commissioners upon the questions of title, capacity in which the land is held, or proportions in which it is to be awarded, is harmless. The maxim is *utile per inutile non vitiatur*. In the case of *Fulton v. Hamlon*, 20 Cal. 483, Mr. Chief Justice Field correctly lays down the rule of law applicable in such cases. The consideration of the character of the title was foreign to the case, and entirely unnecessary for its disposition; and as a consequence, any declaration in the decree as to that title was without any binding force as an adjudication, either upon parties, privies, or anybody else. (*Hotchkiss v. Michaels*, 3 Day, 138; *Coit v. Tracy*, 8 Conn. 268.) The legal operation, therefore, of the decree as an adjudication between the parties, is precisely the same which would have followed had it simply denied the injunction and dismissed the suit for want of equity in the complaint. It establishes the fact that the matters alleged were not sufficient for the exercise of the jurisdiction of a Court of equity. It determines nothing as to the truth or falsity of these matters, or as to the rights of the parties upon them, when they are presented in a Court of law. (*Lessee of Wright v. Deklyne*, Ret. C. C. 198; *Banks v. Adams*, 23 Me. 259; *Pope v. Brett*, 2 Sand. 293.)

The grant confers on the claimant the right of the quiet possession and enjoyment of all the land embraced within the exterior boundaries until segregation is made thereof, (*Thornton v. Mahoney*, 24 Cal. 569,) of which he cannot be deprived without just compensation. (*McCauley v. Weller*, 12 Cal. 500; *Gunter v. Geary*, 1 Cal. 465; *Johnson v. Alameda County*, 14 Cal. 106; *Sacramento Valley Railroad v. Moffat*, 6 Cal. 74; *McCann v. Sierra County*, 7 Cal. 121; *Sacramento Valley Rail-*

road v. Moffat, 7 Cal. 578; *Northern Railroad v. Gould*, 21 Cal. 254.)

Furthermore, proceedings to condemn are not had for the mere purpose of divesting any particular estate in the land, or the interest of an individual therein. The proceedings are *in rem*, operate upon the thing itself, and are intended, when regularly pursued, to effect a complete transfer of the thing and the interest of all persons whomsoever therein.

By the Court, SHAFTER, J.

The objection made by the respondent that no appeal lies from the judgment in a proceeding to condemn lands to the use of a corporation, or from an order granting or refusing a new trial, is not well taken. The point was passed upon directly in *Sacramento, Placer and Nevada Railroad Company v. Harlan*, 24 Cal. 334.

It is suggested, rather than urged, that the doctrine of that case is irreconcilable with *Dorsey v. Barry*, 24 Cal. 449; but the distinction between the two cases is apparent. The Act regulating the trial of contested elections not only provides a special mode or method of trial, but one which we considered as "complete in itself, leaving little, if anything, dependent upon implication or the common law powers of the Court." There is no break in the special procedure applicable to that class of cases which the general Practice Act can be drawn upon to fill. It will be observed that the reasoning in *Dorsey v. Barry* does not go so much upon the quality of the proceedings, as being special or contrary to the course of the common law, as it does upon the ground of the perfectness of the procedure in the given instance—subjecting the question of construction, with which the Court was dealing, to the maxim of *expressum facit cessare tacitum*, in its broadest or most exhaustive application.

It is insisted on the part of the appellant that the "Commissioners erred in allowing the sum of four hundred dollars per acre for the land appropriated, as the evidence shows that

at the time of the appropriation the same was not worth more than one hundred dollars per acre.”

Time when the value of land taken for railroad purposes is to be appraised.

One of the points raised in argument under this specification, relates to the time with reference to which the value of land taken for public use is to be assessed.

There can be no doubt that the land owner is entitled to receive a sum equal to the value of his land at the time when, in the language of the Constitution, the land is “taken” (Pierce on Am. Railways, 203) — subject to the allowance provided for by section thirty of the Act of 1861. It is claimed by the appellant that the taking of the land was accomplished in this case when the plat of the location of the road was filed with the Secretary of State and in the office of the Clerk of the County, under the forty-third section of the Act referred to; or at least, that the taking was in point of time, identical with the actual entry upon the land for the purposes of construction; while it is claimed, on the part of the respondent, that land cannot be said to have been appropriated or taken for public use until the compensation assessed by the Commissioners shall have been paid or tendered.

It is not necessary to a disposal of this appeal on its merits to pass directly upon the correctness of the view taken for the respondent; and assuming the respondent's position to be erroneous, it is also unnecessary to determine which of the two alternative views submitted by the appellant is the correct one.

The map referred to in the forty-third section of the Act of 1861 is to be filed, not before the lands have been taken, as the appellant seems to assume, but thereafter. The provision is as follows: “Every railroad company in this State shall, within a reasonable time after their road shall be finally located, cause to be made a map of the land taken and obtained for the use thereof, and the boundaries of the several counties through which said road may run, and file the same in the

office of the Secretary of State," etc. The taking here spoken of is such an appropriation of the property as deprives the owner of his title (*Cushman v. Smith*, 34 Me. 247); and according to the provision, the filing of the map and the taking or appropriation of the land are neither identical nor contemporaneous. The only relation into which the two events are brought by the section is that the "taking" or "obtaining" of the land is to be consummated before the filing of the map. An event that is to be fully perfected in advance of another event cannot be said to be dependent upon it.

That the Legislature, even if it had the power so to do, did not intend that the acquisition of the title and right of entry should depend at all upon the filing of a map in the public offices named, is further apparent from the thirty-fifth section of the Act in question; which provides that "upon the report of the Commissioners being filed for record, as above provided for, and upon the payment or tender of the compensation and costs, as prescribed in this Act, the real estate, or the right, title or interest therein described in such report, shall be, and become the property of said company for the purposes of its incorporation, and shall be deemed to be acquired for, and appropriated to, public use." The payment, or tender, of the money awarded, is a condition precedent to the right of the company to enter upon the land for the purposes of construction; and without compliance with the requirement such entry may be enjoined by a Court of equity, or prosecuted for in trespass at law. (*Gunter v. Geary*, 1 Cal. 463; *City of San Francisco v. Scott*, 4 Cal. 116; *Sacramento V. R. R. Co. v. Moffat*, 6 Cal. 75; *McCann v. Sierra Co.*, 7 Cal. 124; *McCauley v. Weller*, 12 Cal. 528; *Bensley v. Mt. Lake Water Co.*, 13 Cal. 313; *Johnson v. Alameda Co.*, 14 Cal. 107; *People v. Brooks*, 16 Cal. 47.)

As to the other position taken for the appellants, that the value of the land is to be computed as of the date when the appellant entered for the purposes of construction, we consider it to be untenable. A lawful entry must be preceded by a right of entry; and that must be preceded by payment

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or tender of the compensation previously assessed. To say that the Commissioners are to determine the value of the land with reference to the time when the party enters for the purposes of construction, is to say not only that the Commissioners are to be put upon the anomalous service of finding out, not what is or what has been, but of assessing the value of land with reference to a point of time when it must have ceased to be the property of the party in whose favor the assessment is made, and have become the property of the party in whose favor it has been condemned. Counsel have referred to no provision of the statute sustaining this position, nor to any adjudged case; and we consider the objections to it as insuperable. The time with reference to which the damages were in fact computed in this case does not appear, and we cannot presume that the Commissioners erred in that particular.

As to the amount of the damages, there is nothing in the record that would authorize us in going behind the finding of the Commissioners.

Power of Commissioners who appraise land taken for railroad purposes.

It is found by the Commissioners that David Mahoney is in possession of the land; that James G. Denniston claims to be the owner of one undivided seventh, and that the claim is conceded by Mahoney; and that he holds the possession for the benefit of Denniston to the extent of one-seventh undivided. The report awards eleven thousand and eighty-eight dollars as the value of the land condemned — nine thousand five hundred and four dollars to Mahoney and one thousand five hundred and eighty-four dollars to Denniston. This apportionment of the compensation was confirmed by the Court.

The Commissioners had no power to make the apportionment, nor to pass in any manner upon the question of title; and to that extent the judgment is erroneous. (*Spring Valley Waterworks v. San Francisco et al.*, 22 Cal. 434.)

It appears by the stipulation of parties that the land which the railroad crosses is held by the defendants, Denniston and

Mahoney, under a Mexican grant of half a league, within external boundaries embracing a much larger quantity. The grant has been confirmed, a survey has been made and an appeal has been taken therefrom, which appeal has not as yet been decided.

Until the final segregation of the half league it cannot be known whether the parties claiming under the grant, defendants in the proceeding, are entitled to the assessed value or not. By the Constitution compensation is to be made to the parties owning or interested in the property taken, and the Act of 1861 follows out this conception. Should the road not cross the defendant's half league, as finally located, it is apparent that no property of theirs will have been taken by the company for public use, and in that event they can have no rightful claim to its value. The case is substantially the one provided for in the thirty-sixth section of the Act of 1861, and in the thirtieth section, as amended by the seventh section of the Railroad Act of 1863. The claim of the defendants to compensation is contingent, and not absolute, and, therefore, no absolute award of it to them can be made, as yet.

The money should be paid into Court and remain there until the final segregation of the half league claimed by the two defendants named, shall have been made by the proper authority; at which time, if it shall appear to the Court that the lands sought to be condemned are within the survey of the half league, and that Mahoney and Denniston are the owners thereof, then the money should be paid to them according to their respective rights.

The judgment, in so far as it relates to the value of the land at which the proceedings are directed, is affirmed, and as to the residue the judgment is reversed, and the cause is remanded for further proceedings.

Argument for Appellant.

**C. A. BROWN v. C. M. ORR, IDA ORR, EMMA ORR,
AND THE CALIFORNIA STAGE COMPANY.**

NOTE OF MARRIED WOMAN.—A married woman is not bound by a promissory note executed by her jointly with her husband. It is the note of her husband alone.

COMPLAINT ON PROMISSORY NOTE.—A complaint in an action commenced after the death of the husband on a note and mortgage executed by the husband and wife during the life of the husband, does not state a cause of action, unless it aver that the husband in his lifetime failed to pay the note.

ENFORCEMENT OF MORTGAGE.—A mortgage given by the husband and wife during the life of the husband may be enforced in an action against the heirs after the husband's death.

APPEAL from the District Court, Sixth Judicial District, Placer County.

On the 27th day of September, 1862, William H. Orr, and C. M. Orr, his wife, gave their joint and several promissory note to the plaintiff, and to secure the same, executed to plaintiff a mortgage on a tract of land. William H. Orr afterwards died, leaving him surviving his said wife and two infant children, Ida Orr and Emma Orr. There was no administration on the estate, and plaintiff, in October, 1864, commenced this action on the note and mortgage, and claimed a personal judgment against C. M. Orr. The California Stage Company was made a defendant, under an allegation that it claimed some interest in the mortgaged property.

The other facts are stated in the opinion of the Court.

Jo. Hamilton, for Appellant.

If the Court should hold that no personal judgment could go against the respondent, then demurrer would not lie to the prayer of the complaint, it being a suit in equity. (See *Rollins v. Fisher et al.*, 10 Cal. 299.) A demurrer to the whole complaint, when some of the counts are good, should be overruled. (*Whitney v. Heslep*, 4 Cal. 330; *Weaver v. Conger*, 10 Cal. 239; *Phelps v. Owen*, 11 Cal. 23; *Boles v. Weifenback*, 15 Cal. 144.)

We claim that the Chancery Court, once having jurisdiction of the case, so far as appellant and respondent were concerned,

it was the duty of the Court, under the prayer for general relief, to grant the prayer for the sale of the mortgaged property, appellant, in the decree, taking his chances of a good title upon the suit as he had brought it. (*Vide Belloe v. Rogers*, 9 Cal. 129; *Goodenow v. Ewer*, 16 Cal. 461, 462, 463, etc.; Hilliard on Mortgages, Chap. 30.)

H. H. Fellows, for Respondent.

The first ground of demurrer is good, because the complaint does not aver any breach of the contract by William H. Orr, one of the makers, and the only person liable on the note. It is true that the complaint avers that the defendants have not paid the note, but the averment is immaterial and irrelevant. Neither of the defendants are responsible upon the note, and hence an averment that they have not done what they were not required to do, is, to say the least, irrelevant. It appears from the complaint that defendant, C. M. Orr, was a married woman at the date of the execution of the note, and that the other defendants are made parties for the reason that they are heirs of William H. Orr, deceased, or claim some interest in the mortgaged property. The complaint should have averred a breach of the contract by William H. Orr in his lifetime.

By the Court, SANDERSON, C. J.

This is an action upon a promissory note and mortgage to secure the payment thereof, executed by the defendant, C. M. Orr, and her husband in his lifetime. The complaint in substance alleges that the note and mortgage were made, executed and delivered to plaintiff by the defendant, C. M. Orr, and her husband, William H. Orr, since deceased, in consideration of an indebtedness in the sum of one thousand eight hundred dollars due from them to him. That plaintiff still holds the note and mortgage. That although long since due and payable, the *defendants* have hitherto failed and refused to pay

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the same or any part thereof, though often requested. A personal judgment is asked against C. M. Orr only, and a foreclosure of the mortgage against all of the defendants.

The defendant, C. M. Orr, demurred generally to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and specially that it did not state facts sufficient to entitle the plaintiff to a personal judgment against her, upon the ground that she was a married woman at the time she executed the note, as appears upon the face of the complaint, and therefore legally incompetent to make the contract.

The demurrer was sustained, and the plaintiff having declined to amend, final judgment was entered for the defendants. The plaintiff appeals, and assigns the ruling of the Court upon the demurrer as error.

The ruling of the Court was correct. Upon the note there is no cause of action against C. M. Orr. (*Maclay v. Love*, 25 Cal. 367.) It is simply the note of her deceased husband, William H. Orr, and against him no breach of the contract declared on is alleged. The allegation is "that the *defendants* have failed to pay," not that William H. Orr in his lifetime failed, etc. A breach of the contract by the party bound to perform is an essential part of the cause of action, and must be alleged in the complaint. (1 Chitty's Pleadings, 332.) *Non constat*, but that William H. Orr may have paid the note in his lifetime from all that appears in the complaint. If the note was not paid by William H. Orr in his lifetime, and remains still unpaid, the plaintiff has a cause of action upon his mortgage against the defendants, and has a right to have the amount due ascertained and fixed by the Court and a decree foreclosing the mortgage, but he has no right to a personal judgment against any of the defendants. (*Fallon v. Butler*, 21 Cal. 24; *Willis v. Farley*, 24 Cal. 490; *In the Matter of the Estate of William H. Orr, deceased*, ante, 101.)

Judgment affirmed.

THOMAS WALSH v. HENRY MATHEWS.

IMPROVEMENT OF STREETS IN SAN FRANCISCO.—The Act of 1862 making the owner of a lot fronting on a public street in San Francisco personally liable to a contractor for an assessment on the lot for improvements on the street in front of the lot, and giving the contractor also a lien on the lot for the same, is not unconstitutional.

CASES AFFIRMED.—*Emery v. San Francisco Gas Company*, 28 Cal. 345; and *Emery v. Bradford*, ante, 75, affirmed.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

This was an action to recover from the defendant the sum of eight hundred and ten dollars and forty-three cents, being the amount of an assessment on lots owned by him under a contract made with the Street Superintendent for paving, curbing, and constructing sidewalks on Vallejo street, from Stockton to Powell, in the City of San Francisco.

Defendant claimed that the Act of 1862 was in violation of Article XI, Sec. 13, and Article I, Sec. 8 of the Constitution. Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

H. H. Haight, and *James C. Carey*, for Appellant.

James Mee, for Respondent.

By the Court, SAWYER, J.

It is but just to respondent's counsel to say that at the time the opinion in *Emery v. San Francisco Gas Company*, 28 Cal. 345, was written, their briefs in this case had not been filed, and consequently were not brought to our notice. Also, that many of the cases commented on in the opinion are cited in their briefs since filed. We have examined appellant's brief in reply, and find nothing to shake our confidence in the conclusions attained in *Emery v. San Francisco Gas Company*. The questions in this case are precisely the same, and must be

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resolved in the same way. *Creighton v. Manson*, 27 Cal. 613, seems to have been regarded by counsel for appellant as deciding points that were not determined. It was not decided in that case that the property holder could not be made personally responsible, but only that the Act under which the improvement was made did not impose a personal liability. In this case, as in *Emery v. Bradford*, ante, 75, the work was done, and the assessment levied, under the Act of 1862, which, in express terms, makes the owner, as well as the property, liable.

The judgment is affirmed, on the authority of *Emery v. San Francisco Gas Company*, and *Emery v. Bradford*.

Mr. Justice RHODES and Mr. Justice CURREY expressed no opinion.

A. M. HARRIS AND WM. STICKLE v. A. M. MCGREGOR.

CERTIFICATE OF INCORPORATION.—A certificate of incorporation which does not set forth the name of the city, or town and county in which the principal place of business of the corporation is to be located, does not establish the existence of a corporation.

PREREQUISITES TO CORPORATE EXISTENCE.—There must be a substantial compliance with all the forms of the Act by the persons seeking to become a body corporate, before the corporation can be considered *in esse*.

NONSUIT WORKS DISSOLUTION OF INJUNCTION.—When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial.

RENEWAL OF INJUNCTION AFTER ITS DISSOLUTION.—If a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the remittitur in the Court below.

APPEAL from the District Court, Eleventh Judicial District, Calaveras County.

This was an action to recover the sum of six hundred dollars damages for the diversion by the defendant of the waters of the Middle Fork of the Mokelumne River, in Calaveras County, away from the ditch or canal known as the Sandy Gulch, or Harris' Ditch, and for an injunction to prevent fur-

Statement of Facts.

ther diversion during the pendency of the action, and for a perpetual injunction upon final hearing.

At the time of the issuance of the summons an injunction was granted upon the complaint, restraining and enjoining the defendant from such diversion until the further order of the Court.

On the trial, plaintiffs introduced evidence to show that since 1855 they had been in possession of and claiming as their own the ditch mentioned in the complaint, and that during all the time up to 1864 they had diverted through the same, to the extent of its capacity, the waters of the Middle Fork of the Mokelumne River, and that since 1864, defendant, by means of another ditch, had diverted the water from plaintiffs' ditch. On cross examination of plaintiffs' witnesses, defendant, to prove the title to plaintiffs' ditch to be in a corporation known as the Bunker Hill Canal and Mining Company, offered in evidence a certificate of incorporation of said company, dated September 20th, 1853, being the certificate referred to in the opinion of the Court. Plaintiffs objected to the certificate, because it did not state the name of the city, or town and county in which the principal place of business of the company was to be located. The Court overruled the objection. The Court also, notwithstanding plaintiffs' objection, allowed defendant to prove, on cross examination of plaintiffs' witnesses, that at the date of the certificate the corporation therein named owned an interest in the ditch, and that the corporation then entered into possession of it, claiming it, and issued certificates of stock to the different persons owning interests in the ditch, and that during the time plaintiffs and their grantors had been in possession, they claimed to be the owners, because they had succeeded to the shares of stock in the corporation, and that plaintiffs never received any deed from the corporation, or any license to enter into possession.

No objection was made that this evidence was not proper on cross examination.

Argument for Respondent.

When plaintiffs rested, the Court, on defendant's motion, granted a nonsuit.

The other facts are stated in the opinion of the Court.

Badgley & Tilden, for Appellants.

The certificate of the Bunker Hill Canal and Mining Company is fatally defective. It fails to state the name of the city or town and county where the place of business of the company was to be located, or the place of business of the company at all, as required by the statute. (Wood's Digest, p. 119, Art. 481, Sec. 2.)

In the matter of the application of the *Spring Valley Waterworks*, 17 Cal. 132, the Court said: "The failure to describe the place of business of the corporation, as 'the principal place of business,' was a mere technical error, which did not avoid the Act. The charter could not be held void on any such ground. The statement that San Francisco was *the* place of business, would seem to imply that it was not only the principal but the only place of business." By this argument of a substantial compliance with the Act in this respect, we understand the statement of the place of business to be absolutely necessary; and if it may be omitted from the certificate, what requirements of the Act may not?

William L. Dudley, for Respondent.

The certificate meets the substantial requirements of the provisions of the Act under which it was executed. (Wood's Digest p. 119, Art. 481, Sec. 2.) While it is true that the certificate does not contain the precise words found in the second section of the Act, to wit: "the principal place of business of the company is to be located," still it does contain the following words: "The operations of the company are to be carried on in the County of Calaveras," which we submit meets the substantial requirements of the Act "to provide for the formation of corporations for certain purposes," and defines, in language clear and explicit enough to be understood, the principal place of business of the company. The case cited by

appellants' counsel in 17 Cal. 132, to overthrow this position, in our judgment sustains it fully.

By the Court, SANDERSON, C. J.

We pass the question as to the right of the defendant to prove the title to the Sandy Gulch or Harris Ditch, to be outstanding in the Bunker Hill Canal and Mining Company alleged by the defendant to be a corporation, for the reason that in our judgment the evidence fails to establish the existence of any such corporation. The certificate offered in evidence for the purpose of proving the existence of such a corporation fails to comply with the provisions of the Act under which the alleged corporation was attempted to be formed, in an essential particular rendering it null and void. That Act prescribes with particularity the terms and conditions upon which persons seeking its benefits, and their successors, may become a body politic and corporate, and there must be at least a substantial compliance with each and all of those conditions before the corporation can be considered *in esse*. (*Mokelumne Hill Mining Company v. Woodbury*, 14 Cal. 424.)

Essentials of a certificate of incorporation.

By the express terms of the statute the certificate of incorporation must state the following particulars:

1. The corporate name;
2. The objects for which the corporation is formed;
3. The amount of its capital stock;
4. The term of its existence, not to exceed fifty years;
5. The number of shares into which the stock is divided;
6. The number of trustees and the names of those who are to manage the affairs of the corporation for the first three months;
7. The names of the city or town and county in which the principal place of business is to be located.

With the last of the foregoing provisions of the statute, the certificate in question fails to show a substantial compliance. All that is stated in the certificate in that respect is as follows: "The operations

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of the company are to be carried on in the County of Calaveras, State of California." This language in no sense, either expressly or by implication, can be held to designate the principal place of business of the corporation. It simply designates the county and State where the "operations of the company are to be carried on." But the "operations" of a corporation may be carried on in one county and their principal place of business, within the meaning of the statute, be in another and distant county; or the former may be in one State and the latter in another. But could we understand the language in question as fixing the principal place of business of the corporation in Calaveras County, the failure to comply with the statute would only be less in degree, for there is no specification of the "city" or "town," which is no less essential than the designation of the county, for it is so expressly provided. The "principal place of business" contemplated and intended by the statute is the principal office of the corporation at which the books of the corporation are kept and its officers usually and ordinarily meet for the purpose of managing the affairs and transacting the business of the corporation, and the statute requires that the city or town, as the case may be, at which such office is to be located shall be stated in the certificate, for reasons which are obvious. But whether for reasons or not is immaterial, for the same will which alone can confer corporate privileges can prescribe the conditions of the grant, and it is sufficient to say that such and such are the conditions.

In view of the judgment of nonsuit the order dissolving the injunction was proper; the latter followed the former as a matter of course. Upon the return of the case to the Court below the plaintiff will be entitled to a renewal of the injunction upon a proper application.

Judgment reversed and cause remanded for further proceedings.

Opinion of Sawyer, J., concurring specially.

SAWYER, J., concurring specially.

Plaintiff relied for recovery on an actual prior possession for a long period of time, and under the well settled rule in this State, all the evidence of the defendant relating to the corporation was irrelevant and inadmissible. (*Bird v. Lisbro*, 9 Cal. 1; *Hubbard v. Barry*, 21 Cal. 325; *Richardson v. McNulty*, 24 Cal. 347, 348.) On this ground, also, the judgment should be reversed.

JOHN COCHRAN v. DAVID COLLINS.

SIXTH SECTION OF CONSOLIDATION ACT OF SAN FRANCISCO.—The clause in the sixth section of the Act of 1862, amending the Consolidation Act relating to San Francisco, allowing the owners of the major part of the frontage of lots liable to be assessed for street improvements to take a contract at the price awarded without having put in a bid, means in those cases where a small street terminates in a principal street, the owners of the major part of the frontage on the principal street.

COMPLETION OF STREET CONTRACT IN SAN FRANCISCO.—The owner of a lot sued for street improvements in San Francisco cannot show in defense that the contractor did not perform the work according to his contract, if the Superintendent of Streets has accepted the work as completed. His remedy is an appeal from the decision of the Superintendent to the Board of Supervisors.

RESOLUTION TO DO WORK ON A STREET IN SAN FRANCISCO.—Under the provisions of section three of the Act of 1862, the Mayor of the City and County of San Francisco is not required to sign a resolution of the Board of Supervisors declaring their intention to improve a public street.

ASSESSMENT FOR STREET IMPROVEMENTS ASSIGNABLE.—A demand by a contractor against the owner of a lot in San Francisco for an assessment on the lot for street improvements, is assignable.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Mayor of the City and County of San Francisco did not sign the resolution of the Board of Supervisors declaratory of their intention to construct the sewer.

The owners of the major part of the frontage of lots on Fifth street, the street improved, took the contract, and plain-

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tiff sued as the assignee of their demand for the assessment. Plaintiff recovered judgment, and defendant appealed.

The other facts are stated in the opinion of the Court.

John Lord Love, for Appellant.

Brooks & Whitney, for Respondent.

By the Court, SAWYER, J.

This is an action to recover an assessment made for constructing a sewer on Fifth street, between Folsom and Howard streets, in San Francisco, under the provisions of the Consolidation Act, as amended in 1862. Under section six of the Act of 1862, "the owners of the major part of the frontage of lots and lands liable to be assessed for said work" are authorized to elect to take the contract at the price awarded without having put in a bid. Section eight, subdivision one, provides that the expense of the improvement "shall be assessed upon the lots and lands fronting thereon," except as thereafter provided, "in proportion to frontage." And it is thereafter, in subdivision seven, provided, that where a small street terminates in another street, the expense of the work on one half the width of the (main) street—that is to say, one half the expense of the work on the principal street—opposite the termination of the small street, "shall be assessed on the lots fronting on such small street." (Laws 1862, p. 391-393.) The question is whether, under these provisions, the major part of the owners fronting on the principal street—that is to say, the lots fronting on the improvements—are authorized to take the contract; or must it include the major part of the owners on both the main and the small street terminating in it. We think, upon comparing subdivisions one and seven of section eight with section six, that the obvious intention was to allow the major part of the owners in frontage of lots fronting on the improvement to take the contract. The small street terminating in the larger, under these provisions, is regarded as a lot chargeable with one half the improvement

in front of the end at the termination, the same as the lot on the other side of the large street fronting the termination is charged with one half. Although for the purpose of making the improvement, and apportioning the expense upon the lands fronting on it, the small street is regarded as other lots, yet as it belongs to the public, and the property owners fronting on it are benefited by the improvement of the main street, the portion primarily chargeable upon the street fronting on the improvement is subdivided and distributed upon the owners of lots fronting on the small street. We think the contract properly let to the major part of the owners of lots fronting on Fifth street.

The point that the work was not done according to contract is disposed of by the cases of *Emery v. Bradford*, ante, 75, and *Walsh v. Mathews*, ante, 123.

The third point made is answered by the last clause of section three of the Act of 1862 amending the Consolidation Act. (Laws of 1862, p. 392-393.) There is no force in the point made upon the assignment.

Judgment affirmed.

Mr. Justice CURREY and Mr. Justice RHODES expressed no opinion.

WILLIS LONG AND W. B. LONG v. JOHN M. NEVILLE,
SHERIFF OF SOLANO COUNTY *et als*.

DUTY OF SHERIFF IN SERVING WRIT OF RESTITUTION.—It is the duty of the Sheriff, having the writ of *habere facias possessionem*, to remove all persons who came upon the property after the suit was brought, except a person other than the defendant, who is in possession under a title adverse to the defendant.

SERVICE OF WRIT OF *Habere Facias Possessionem*.—Where ejectment is brought against a tenant alone, and pending the action the landlord dispossesses him and leases to another tenant who has no notice of the pendency of the action, it is the duty of the Sheriff who receives the writ of *habere facias possessionem* to remove the second tenant.

***Is pendens*.**—The notice of *is pendens* does not apply to the action of ejectment. It applies only to actions which operate directly upon the title.

EJECTMENT DOES NOT AFFECT TITLE.—Actions of ejectment do not affect the title to property, but the possession. The plaintiff recovering possession goes into possession with the title he previously had.

Argument for Appellant.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellant.

The vital question in this case is, whom was it the Sheriff's duty to put out under the writ of possession? Our answer is, every one, without exception, that comes upon the land after the ejectment suit against the Hulls was commenced.

It is said, we might have joined Ellis as a party defendant in the ejectment suit against the Hulls, under the authority of the thirteenth section of the Practice Act. The case of *Garner v. Marshall*, 9 Cal. 268, not only decides that ejectment cannot be maintained against a party not in possession when suit is commenced, but also decides that the thirteenth section of the Practice Act does not apply to suits in ejectment, but but refers only to equity cases.

If the tenant when sued has made default, and the landlord had no notice of the suit, he may apply to the Court, even after a judgment and the writ thereon executed, and have the judgment opened, himself restored to the possession, and his defense entered. And this is the rule in all cases when the Sheriff, under the writ, has or is about to turn out any one who has entered after suit commenced under a claim of right which might have been interposed against the plaintiff's action, to apply to the Court to open the judgment, supersede the writ, and allow the defense, not to remain out of Court and defy its process. (*Barrett v. Graham*, 19 Cal. 632; *Long v. Morton*, 2 A. K. Marshall, 39; *Doe ex dem. The Grocers' Co. v. Roe*, 5 Taunton, 205.)

When the Court does not interfere to stop the service of the writ, the Sheriff must put off every one that entered after the commencement of the suit. No change of possession of the premises after suit brought can be allowed to defeat the execution of the judgment when once finally obtained. (Sec.

Argument for Respondent.

253 of the Practice Act; *Hickman v. Dale*, 7 Yerg. 149; *Jackson v. Tuttle*, 9 Cow. 233; *Wallin v. Huff*, 3 Sneed, 82.)

Whitman & Wells, for Respondent.

The question is doubtless one of general interest as a question of practice, and we may properly urge that the twenty-seventh section of our Civil Practice Act is intended to be of general and uniform application as regards all actions, either legal or equitable. Its provisions are extended to actions affecting the title to real property, and in conformity to the rule of law which regards possession as *prima facie* evidence of title, an action which adjudicates the possession does affect the title, and is therefore within the statute.

The cases of *Richardson v. White*, 18 Cal. 102, and *Sampson v. Meyer*, 22 Cal. 200, seem to affirm the statutory provisions, and make it applicable to all forms of action to its full effect; that is, to impart constructive notice of the pendency of the suit, the latter case recognizing actual notice and the doctrines regarding it as unaffected by the statute, and we submit as worthy the attention of the Court that such rulings should be allowed to stand, and the statute be recognized as applicable to all classes of action that fall within its terms. Such we believe to be in accordance with the general course of practice.

But if the decision of this Court be otherwise, we still submit that the doctrine of *pendente lite* has no application to this case. The most that can be claimed is that those who come in by, through, or under the party in possession, must go out under the writ. Therefore privity is essential; but here there was no privity. In the old phrase, the party, Brown, came not in *per* the defendant in the suit, but *post*. There was no mutuality in his relation to the defendant in the original suit.

Opinion of the Court — SANDERSON, C. J.

By the Court, SANDERSON, C. J.

This is an action for damages against a Sheriff and his sureties for his neglect and refusal to execute a writ of *habere facias possessionem*. Judgment of nonsuit was rendered in the Court below. The facts disclosed by the plaintiffs' evidence are substantially as follows: The plaintiffs commenced an action of ejectment against two persons by the name of Hull, who were in the actual possession of the land at the time the action was brought. The Hulls were in possession as tenants of one Ellis, who attempted to intervene by petition, as provided in the six hundred and sixty-first section of the Practice Act; but the plaintiffs demurred to his petition and the demurrer was sustained by the Court. The Hulls made default, and judgment was regularly entered against them and them only for the possession of the land. Pending the action of ejectment, Ellis brought an action against the Hulls under the thirteenth section of the Act concerning forcible entry and unlawful detainer, in which he obtained judgment and dispossessed the Hulls.

Afterwards Ellis leased the land to one Brown, who was in possession at the time the Sheriff received the writ. No notice of *lis pendens* was filed in the Recorder's office, nor had Brown actual notice of the pendency of the action. Upon this state of facts the Sheriff refused to execute the writ.

The only question involved in the case is whether the Sheriff, upon the facts stated, could lawfully dispossess Brown under the writ. If he could, he was bound to do so; and, having failed and refused, he and his sureties are liable to the plaintiffs for such damages as they may have sustained by reason of such refusal.

In what cases notice of lis pendens must be filed.

The question involved is wholly unaffected by the twenty-seventh section of the Practice Act relating to notice of *lis pendens*. By its own terms that section does not apply to actions affecting the possession of real property, but, on the

contrary, is confined to actions affecting the title thereto. Actions of ejectment do not affect the title, but the possession. The title remains after judgment precisely where it was before, and is only brought into the case for the purpose of aiding the Court in determining to whom the possession belongs. The judgment transfers the possession to the plaintiff if he shows a better right to it than the defendant, but the plaintiff does not thereby acquire any better or other or different title than he had before; on the contrary, he goes into possession under whatever title he may have previously had. He goes into possession according to his title, and the title and the possession unite. If he has a freehold interest he goes in as a freeholder; if he has a chattel interest he goes in as a termor, and if he has no title at all he goes in as a trespasser. (Tillinghast's *Adams*, 327; *Chapman v. Armistead*, 4 Mumford, 390.)

The twenty-seventh section only applies to actions which operate directly upon the title and by the result of which some change as to the title is wrought. Examples of which are found in actions for the condemnation of real estate, and the specific performance of contracts relating thereto, for the foreclosure of mortgages, or other liens, and the like.

What persons Sheriff may dispossess under writ of habere facias possessionem.

What parties can be dispossessed under a writ of *habere facias possessionem*, under any and all circumstances, is not very clear upon authority. Some cases go so far as to hold that all persons who enter into possession after the commencement of the action, regardless of how or by what title they entered, must go out, upon the ground that otherwise there might be no end to litigation; while other cases seem to go no further than to hold that the defendant and those entering under or succeeding to him in the possession of the land only need go out, upon the ground that none are affected by the judgment except parties and privies, and that no one can be deprived of his property without first having been allowed his day in Court; and we apprehend that these two principles,

which practically amounts to the same thing, together furnish the true test for the solution of every case. The first is incorporated in the two hundred and sixty-third section of the Practice Act, which is in these words: "An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action." *Prima facie*, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant; but this *prima facie* case is rebutted when it appears that some person other than the defendant is in possession under a title adverse to his, for the right to the possession flowing from such a title has not been determined by the judgment. By way of illustration take a case which is put by the Court in *Jones v. Chiles*, 2 Dana, 321. Two actions of ejectment are pending against the same *terre-tenant* prosecuted by different plaintiffs upon different titles, both of which are adverse to that of the *terre-tenant*; both plaintiffs recover judgment, and the plaintiff whose action was commenced last takes possession under a *habere facias*. Can the plaintiff whose action was instituted first turn the other out under a *habere facias* against the *terre-tenant*? The Court answers the question thus: "If each plaintiff asserted a different title against the defendant in possession, and if the tenant held adversely to the titles thus asserted, and is not privy to or connected with either of the titles, we think that the plaintiff who obtained possession under his judgment first could not be dispossessed in virtue of a *habere facias* against the tenant in favor of the plaintiff in the other action. The rights of such claimants ought to be tried in a suit to which they are parties before either should molest the other, gaining possession under a judgment against the *terre-tenant*." The reason being that the title of the first plaintiff has not been tried; or in other words, his right to the possession has not been determined by the judgment under which the second plaintiff claims the possession, and to allow him to prevail would be to turn the first plaintiff out without

his day in Court. Now, bearing the reason of the rule in mind, let us change the conditions by supposing that the title of the first plaintiff is not adverse to that of the *terre-tenant*, as in the case of landlord and tenant, and what is the result? Obviously the opposite of the former, for the reason given for the former is wanting here. The first plaintiff has not obtained possession under a title adverse to that of the *terre-tenant*, and which was not tried in the other action, but has succeeded to the possession under the same title which was held by the *terre-tenant*, and which was tried in the other action and as against which the second plaintiff has prevailed and recovered possession.

In the present case the *terre-tenants*, the Hulls, were the tenants of Ellis. Pending the action, Ellis obtained possession by virtue of his action against the Hulls under the thirteenth section of the Act concerning forcible entries and unlawful detainers, and with notice of the pending action of ejectment. Being in possession he leased to Brown. Thus Brown came in under the same title and held the same right to the possession which was held by the Hulls when the action was commenced against them; or in other words, the same right to the possession which was determined in that action. It follows that the Sheriff could have lawfully dispossessed Brown under the writ in question, and having failed to do so has made himself and his sureties liable to this action.

Judgment reversed and new trial ordered.

SHAFTER and RHODES, Justices, dissenting.

We dissent.

Opinion of the Court — SANDERSON, C. J.

**JAMES B. CHASE v. LOUIS BERAUD AND JEAN GAR-
RAUD.**

SURETIES ON APPEAL BOND.—Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmance of the judgment, and charges the sureties on the undertaking on appeal.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment, and defendants, who were the sureties on the undertaking on appeal, appealed.

The other facts are stated in the opinion of the Court.

Byrne & Freelon, for Appellants.

James Mee, for Respondent.

By the Court, SANDERSON, C. J.

The only question involved in this appeal relates to the effect of a judgment of this Court dismissing an appeal upon the liability of the sureties upon the undertaking on appeal, it being claimed that they do not become charged by such a judgment, and that such a result follows only from a formal judgment of affirmance in whole or in part.

The appeal in question, as appears from the record, was dismissed upon the motion of respondent, based upon the written consent of the attorneys for the appellant. Thus made, the judgment of dismissal was a final determination of the appeal by this Court, and the judgment of the Court below was no longer open for review. Such being the case, the question as to its effect upon the liability of the sureties upon the undertaking is not an open question in this State. Such a dismissal operates as an affirmance of the judgment and suffices to charge the sureties. (*Osborn v. Hendrickson*, 6 Cal. 175; *Karth v. Light*, 15 Cal. 324; *Chamberlain v.*

Opinion of the Court — Rhodes, J.

Reed, 16 Cal. 207; *Ellis v. Hull*, 23 Cal. 160; *Rowland v. Kreyenhagen*, 24 Cal. 52.)

Judgment affirmed.

Mr. Justice RHODES expressed no opinion.

W. H. LYONS v. C. M. LEIMBACK *et al.*

OMMISSION IN FINDINGS OF FACT.—Where the findings in a case tried by the Court do not contain all the facts necessary to be proved in order to entitle the prevailing party to a judgment, it will not be reversed on appeal unless the Court below has, after the defect has been pointed out, failed or refused to make the required finding, and an exception has been taken thereto.

PRESUMPTION THAT FACTS NOT FOUND WERE PROVED.—If the findings are defective, the presumption is that the facts not found were proved, unless the Court below is requested to supply the defect, and fails or refuses to do so.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

P. L. Edwards, and *H. H. Hartley*, for Appellant.

M. M. Estee, and *W. W. Upton*, for Respondent.

By the Court, RHODES, J.

This is an action of ejectment which was tried by the Court, and the defendants had judgment. The appeal is taken from the judgment, and the cause comes before us upon the judgment roll alone, there being neither a statement nor a bill of exceptions annexed to the record.

The plaintiff claims under a patent from the United States, issued to him in 1860; and the defendants claim under a certificate of sale, issued to J. H. Barton by this State, on the sale of the premises as a portion of the lands selected by the State under the Act of the Legislature, passed April 23d, 1858, in part satisfaction of the grant of five hundred thousand

acres of land, made to the State by the eighth section of the Act of Congress of the 4th of September, 1841.

The points made by the appellant are presented for the purpose of establishing the proposition, that there was not a compliance by the defendant's grantor with the laws of the United States or of this State, in relation to the selection and sale of lands under the grant of Congress, and therefore no title passed to him from the United States; but those points cannot be made on the record before us. The complaint is in the form usual in actions of ejectment, and all the facts alleged therein are put in issue by the general denial in the answer. The finding does not respond distinctly to the several issues, either specifically or generally, and is composed mainly of evidence, and contains but few of the facts of the case. Previous to the passage of the Act of 1861 to regulate appeals (Stats. 1861, p. 589), it was intended that a Court trying a cause without a jury, should state in the finding all the facts that might be necessary, in addition to those admitted by the pleadings, to constitute a basis for the judgment—that is to say, if the finding was for the plaintiff, that the facts found and those admitted should constitute a complete cause of action within the allegations of the complaint; and, if for the defendant, that the facts found and those admitted should constitute a defense to the action. A finding containing less than we have stated, would answer no conceivable purpose, for if it lacked one fact essential to the support of the judgment it was as radically defective as if lacking all of them.

Finding of facts.

The statute of 1861, which we have referred to, has obviated the necessity of preparing the finding with the precision we have mentioned, and, indeed, of filing any finding, unless objections are made in the Court below on account of a defective finding, or for the want of a finding. The Act declares that the judgment shall not be reversed "for want of a finding, or for a defective finding of the facts, unless exceptions be made in the Court below to the finding or the want of a

finding." The finding referred to in both cases is obviously the finding of facts, and does not include the conclusions of law, for a decision of the cause could not be said to be given, unless the conclusions of law from the facts in the case were either stated specifically, or combined in a general statement, as that judgment be entered for the prevailing party, or that he is entitled to recover, or the like. With this statute operating in respect to the finding with greater curative qualities perhaps than any statute of amendments and *jeofails* that can be found, it is of no consequence that the finding is defective in its statements of facts found, unless objection on that ground is made in the Court below. In case the facts found are entirely inconsistent with the decision, and cannot be reconciled with any state of facts which might have been proven, and upon which the decision may be supported, the judgment doubtless would be reversed; but that is not a defective finding of facts. The point presented by the plaintiff that "on the part of the respondents and their grantor there has been no compliance either with the laws of the United States or of the State," means, of course, that such a compliance was not found by the Court—that the finding is defective, because it does not contain all the facts necessary to show a compliance with the laws of the United States and this State, and thus to make it appear that a complete and valid title passed from the United States to the defendant's grantor, before the issuing of the patent to the plaintiff. Questions as to the sufficiency of the evidence to prove those facts are not involved in the point, for there is none of the evidence in the record except what is improperly incorporated into the finding. But the point falls clearly within the Act of 1861, and it affords an instance of the mode of practice which it was intended should be changed by the statute. The plaintiff, without having brought the defects in the finding to the attention of the Court below, and thus given it an opportunity to supply the omitted facts, which, in consequence of the decision for the defendant, it is presumed were established by proof (*Owen v. Morton*, 24 Cal. 377) now asks this Court to hold that the finding, which he did not

Argument for Appellant.

complain of in the Court below, does not contain facts sufficient to warrant the judgment. The statute declares that the judgment shall not be reversed because of the omission from the finding of a part or all of such facts, unless the Court below has, after the defect has been pointed out, refused to make the proper finding. (*Warner v. Holman*, 24 Cal. 228; *Cook v. De la Guerra*, Id. 241; *Hurlburt v. Jones*, 25 Cal. 229.) Judgment affirmed.

JAMES C. HUNSAKER v. JOSIAH STURGIS.

INCOME RECEIVED BY PLEDGEE FROM PROPERTY PLEDGED.—Where the relation of pledgor and pledgee exists, if the debt is paid, it is the duty of the pledgee to account for and pay over all the income, profits, and advantages derived from the bailment.

FRAUD BY AGENT OF VENDOR BECOMING AGENT OF PURCHASER.—If the pledgor makes the pledgee his agent to sell the property pledged, and the pledgee then becomes the agent of the purchaser, he commits a fraud on the pledgor, and is bound to pay him all that he received from the purchaser for acting on his behalf.

BREACH OF CONFIDENCE BY UNPAID AGENT.—Where a person voluntarily becomes an unpaid agent of another to negotiate a sale of stock of a corporation, and then receives a certain sum from a purchaser as a reward for acting in his behalf, and procuring a sale for less than the purchaser was willing to pay, the agent becomes liable to the owner for the loss he sustained by this breach of confidence.

BREACH OF CONFIDENCE.—Where one reposes special confidence in another in negotiating a sale of property, and the other seeks this confidence, and then betrays it to the damage of the one by whom he was trusted, he becomes liable for the loss sustained thereby.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment for the sum of two thousand two hundred and fifty dollars, and defendant appealed.

The other facts are stated in the opinion of the Court.

Clarke & Carpentier, for Appellant.

To constitute an agent for any purpose, he must be clothed with authority by the employer to do something, the performance of which, or damages for non-performance, might be enforced by the other principal.

In the case made by the testimony it is not pretended that the defendant was authorized to do any act, or make an engagement, in the name or behalf of the plaintiff or his assignors, nor that the defendant "assumed to do the business and render an account of it." (Paley's Agency, 1.) Authority, consideration, and reciprocity of agreement, were wanting.

Sloan & Provines, for Respondent.

"Wherever confidence has been reposed, justice forbids that it should be abused; and the rule applies as strongly to those who have gratuitously or officiously undertaken the management of another's property as to those who are retained or appointed for that purpose and paid for it. (*Rankin v. Porter*, 7 Watt, 390.)

"The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance." (1 Smith's Lead. Cases, marg. p. 96, top p. 254.) And this, even though the undertaking be gratuitous, (*Wilkinson v. Coverdale*, 1 Esp. R. 74,) if the agent or bailee be guilty of gross negligence or fraud. (*Doorman v. Jenkins*, 2 Ad. & Ell. 256.)

"The principle is, that where a party affirms either that which he knows to be false or does not know to be true, to another's loss and his own gain, he is responsible in damages for the injury occasioned by such falsehood." (*Lobdell v. Baker*, 1 Met. 201.)

By the Court, SHAFTER, J.

Hunsaker, Tyler, Wittenmyer and the defendant, all residents of the Town of Martinez, were stockholders in the "Black Diamond Coal Mining Company," the first three owning one sixteenth each of the capital stock, and Sturgis holding a still larger interest. The stock belonging to Hunsaker was held by Sturgis in pledge to secure a debt of two thousand five hundred dollars which Hunsaker was owing him. The evidence tended to prove that plaintiff, in April, 1863, sold

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his stock to Marziou & Co., of San Francisco, for the sum of four thousand five hundred dollars, and Tyler and Wittenmyer soon after sold out in like manner to the same parties for the same money. The evidence further tended to prove that the plaintiff, some months before his sale to Marziou & Co., authorized the defendant to sell his, the plaintiff's, stock "for the most he could get," and that the defendant under professions of friendship for the plaintiff, undertook to aid him in finding a purchaser and without pay for his services. That he also volunteered to aid Tyler and Wittenmyer in selling their stock, at the best price, to Marziou & Co.; and undertook and was instructed by them to find out and report what was the best that could be done with that firm. That Sturgis on applying to Marziou & Co., was informed that they considered a sixteenth part of the stock cheap at six thousand dollars, and that they were ready to take the three sixteenths in question at that rate. The evidence further tended to prove that Sturgis thereupon informed Marziou & Co. of the confidential relations in which he stood to the owners of the stock, and that he told them further, or gave them to understand, that through him and "by reason of his situation with respect to those parties," their interests could be bought at less than the sum which the firm was ready and willing to pay, and that it was thereupon arranged between Sturgis and Marziou & Co. that he (Sturgis) should be and become the secret agent of the company for the purpose of buying the three sixteenths at the lowest possible figure, and if a sale of the stock to Marziou & Co. should be effected through the defendant's procurement, at less than six thousand dollars per sixteenth, that the said purchasers would pay to defendant for his services one half the difference between six thousand dollars and the sum at which the purchase should be made. The evidence further tended to prove that the defendant in pursuance of this arrangement, represented to the owners of the stock that he had seen Marziou & Co., and that they would give four thousand five hundred dollars for each of their sixteenths and no more; and advised them to call upon Marziou & Co. in person. The parties afterward acted on this advice,

but the evidence tended to prove that the defendant, in the interval, advised Marziou & Co. that he had told the plaintiff Tyler and Wittenmyer that they, Marziou & Co., would pay no more than four thousand five hundred dollars per sixteenth; and that when called upon by the owners of the stock, they refused in pursuance of the previous collusion, to buy at a higher rate. Thereupon the owners assented to the offer of four thousand five hundred dollars made through Sturgis, and Marziou & Co. paid the defendant two thousand two hundred and fifty dollars as agreed, it being one half of three times the difference between four thousand five hundred dollars and six thousand dollars. Subsequently Tyler and Wittenmyer assigned to the plaintiff, and this action is brought to recover the two thousand two hundred and fifty dollars named.

Pledgor and pledgee, and agent and principal.

First — The relation of pledgor and pledgee existed between the plaintiff and defendant in so far as the plaintiff's stock was concerned; and the debt having been paid, it became the duty of the defendant to account for all the income, profits and advantages derived by him from the bailment. The defendant could make no gains to himself, directly or indirectly, in dealing with the stock. It was a fraud on his part to become the agent of Marziou & Co. to buy that which he himself held in trust for another; and he is bound to pay over all that he received from them, no matter how he, or he and they, may have first divided, and then named the different parts of the sum. But aside from the pledge, the evidence tended to prove that the defendant became the agent, not only of the plaintiff, but of Tyler and Wittenmyer also, to find out and report the highest price for which the stock could be sold, and particularly to ascertain and report the best price which Marziou & Co. would pay. The defendant not only accepted but solicited this trust. It is a matter of no moment, so far as defendant's obligations are concerned, that his services were to be without pay. There are unpaid as well as paid agents — a distinction

taken as early at least as *Coggs v. Barnard*, Lord Raymond, 900, and recognized ever since. The defendant was not legally bound to make inquiry after purchasers, for his undertaking so to do was without consideration; and having found out what Marziou & Co. would pay, he might have safely omitted to report the result for the same reason. But when he undertook to report he was bound to tell the truth.

Duty of agent towards principal.

But should it be admitted that the defendant was not an agent *eo nomine* of the several owners of the stock and that he did not stand in any trust known by a technical name; it in our judgment would on the facts of the case make no difference. It is enough that there was a special confidence reposed in the defendant; that he sought it and then knowingly betrayed it to the damage of those by whom he was trusted, and for a mercenary purpose. This is even more than enough to hold the defendant; for in the leading case of *Pasley v. Freeman*, 3 T. R. 51, there was not only no privity of contract between the parties to the action, but there was no collusion between the defendant and Falch whose claims to credit the defendant knowingly misrepresented. Nor did it appear that Freeman made his false recommendations with a view to a money or any other profit. The case was decided on the broad principle that a false affirmation made by one man to another with intent to defraud him, and whereby he is damaged, is an actionable injury; no matter whether the party practicing the deceit is benefited by it or not or colludes with the person who is. The authority of that case has never been shaken, and the principle upon which it proceeds has received the widest judicial recognition. (2 Smith's, L. C. 146.) Legal obligations and moral obligations are not always the same, but when they are found to coincide the advantage must be regarded as too valuable to be surrendered.

We might proceed to modify the judgment, but inasmuch as the defect in the plaintiff's proof may be supplied, we

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consider that the ends of justice would be best subserved by granting a new trial.

Judgment reversed and new trial ordered.

NOTE.—The judgment was reversed because the assignments from Tyler and Wittenmyer to plaintiff had been admitted in evidence without being stamped. Subsequently a rehearing was granted in the Supreme Court on the ground of the decision on that question. Pending the rehearing and before re-argument, the case was settled. That portion of the opinion relating to the stamps is not published.

REPORTER.

THE BOARD OF COMMISSIONERS OF THE FUNDED
DEBT OF THE CITY OF SAN JOSE (No. 2) v.
COLEMAN YOUNGER.

RIGHT OF ATTORNEY TO MANAGE A CAUSE.—While an attorney of record remains such, his right to manage and control the action cannot be questioned by the opposite party.

APPEARANCE *in pro. per.* OR BY ATTORNEY.—A party to an action may appear in his own proper person, or by attorney, but he cannot do both; and if he appears by attorney, he cannot assume control of the case.

CLIENT CANNOT DISMISS SUIT IF ATTORNEY OPPOSES.—If a plaintiff who has appeared by attorney, afterwards stipulates in writing that the action be dismissed, the Court should not make an order of dismissal unless the attorney of record assents to the same.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

S. O. Houghton, for Appellant.

C. T. Ryland, and *C. B. Younger*, *in pro. per.*, for Respondent.

By the Court, SANDERSON, C. J.

This is an appeal from an order dismissing the action made under the following circumstances:

The action was tried and a final judgment entered therein in favor of the plaintiffs, on the 20th of January, 1864. On the 10th day of January, 1865, the motion of the defendant for a new trial was granted. On the 19th of January, 1865,

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counsel for the defendant filed in Court a stipulation, signed by the Commissioners of the Funded Debt of San José in person, and not by their attorney of record, to the effect that the matters in controversy had been settled, and that the action might be dismissed, and also a receipt, signed by the Treasurer of the Board, in full payment for the land, to set aside the conveyance of which, on the ground of fraud, this action was brought, and thereupon moved the Court to dismiss the action, grounding his motion upon the one hundred and forty-eighth section of the Practice Act, which provides, among other things, that an action may be dismissed by either party, upon the written consent of the other. This motion was resisted by the attorney of record of the plaintiffs, and a counter motion was made by him to strike the stipulation from the files of the Court. Both motions were heard together upon affidavits presented by both parties, and the motion of the defendant finally prevailed.

It appears from the affidavits that the action was commenced and prosecuted for the purpose of reforming a deed of certain land held by the plaintiffs, in their capacity of trustees, to the defendant, on the ground of fraud, under an agreement with one Gish (who claimed that under the rules and regulations of the Board of Commissioners touching the sale of lands so held by them, he was entitled over the defendant to become the purchaser of the land so sold and conveyed to him,) to the effect that if a reconveyance could be obtained from the defendant, either voluntarily or by a resort to the Courts, they would thereafter convey to him, he agreeing to pay all costs and expenses, including the fees of counsel. And it further appears that Gish employed counsel, and up to the time the order in question was made, prosecuted the case in all respects at his own expense, and that neither he nor the attorney of record so employed by him ever assented to the stipulation dismissing the action signed by the plaintiffs.

It also appears that the Commissioners settled the case and authorized its dismissal under a misapprehension as to its true

condition, and that they would not have done so had they been fully advised.

It is first contended on the part of the respondent that this appeal is being prosecuted, like the action itself prior to its dismissal, by Gish, and not by the plaintiffs. In answer, it is sufficient to say that the appeal has been taken, and is being prosecuted by the plaintiffs' attorney of record, and while he remains attorney of record, his right to manage and control the action cannot be questioned. Whether, in taking the appeal he has gone beyond or violated his instructions, is a question between him and his clients, in which the defendant has no concern and need not interest himself.

Right of attorney to control a case.

A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney he must be heard through him, and it is indispensable to the decorum of the Court, and the due and orderly conduct of a cause that such attorney shall have the management and control of the action and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record the Court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney the law points out a remedy. He may move the Court for leave to change his attorney, as provided in section ten of the Act concerning attorneys and counsellors. Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the Court unless the same is signed or assented to by such attorney. (Section nine of the Act concerning attorneys and counsellors.) Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary. Moreover (without being understood as making any reference to the present case,) it is proper to add, that to entirely ignore the attorney of record and enter, without his

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consent, into secret negotiation with his client touching the management of his case, is unbecoming the dignity of the legal profession, and destructive of that courtesy which is due from one member to another.

The one hundred and forty-eighth section of the Practice Act does not affect the question under consideration. That section provides that an action may be dismissed by either party upon the written consent of the other; and we add that where there is an attorney of record, such consent must come from him or be sanctioned by him.

Upon the question whether the Court ought to allow the plaintiffs to control the action at all, in view of their agreement with Gish, we express no opinion. We only say that if the defendant has secured a valid settlement of the matters involved in the case, he must avail himself of it in some other mode.

Order reversed.

Mr. Justice RHODES expressed no opinion.

**M. GRADWOHL v. L. B. HARRIS AND M. H. TURRILL,
DEFENDANTS, AND S. WAUGENHEIM AND ISAAC
BLUM, INTERVENORS.**

SUIT BY ASSIGNEE OF A CLAIM.—An absolute assignment of a demand enables the assignee to sue for and recover the whole debt, even though by the assignment he acquired only a portion of the demand.

INTERVENTION BY PART OWNER OF CLAIM SUED ON.—If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment.

EVIDENCE OF ADMISSION OF SUM DUE ON A CONTRACT.—If a contract in writing is made by a person to repay such sums as may afterwards be advanced to the agents of a toll road company, a statement in writing, signed by him afterwards, admitting that the toll road company is indebted in a certain sum for money advanced on the contract, is admissible in evidence in an action on the contract brought against him.

CONTRACT TO PAY MONEY.—STATUTE OF FRAUDS.—A contract in writing, agreeing to pay to the party of the second part such sums as he may afterwards advance to a foreman of a toll road company, is not a promise to pay the debt of another, and not within the Statute of Frauds.

Statement of Facts.

MISTAKE IN WRITTEN ADMISSION—PAROL PROOF OF.—A written admission that a certain sum is due on a contract, signed by the party making the admission, does not estop him from showing by parol testimony that there was a mistake in the admission.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This action was brought to recover moneys alleged to have been advanced by Waugenheim & Blum on the following contract:

“We, the undersigned, agree to refund and pay within thirty days, to Messrs. Waugenheim & Blum, such sum or sums as they may pay to the order or certificate of William A. Johnson, (a foreman of the Silver Mountain Toll Road Company,) given by him to any employés who have labored for said company under him; also, to the order or certificate as above of George Phillips, a foreman of said company, to any employés who have labored for said company under him, with interest thereon from the date of said payments at the rate of two per cent per month, payable in gold coin of the United States.

“SACRAMENTO CITY, January 10th, 1864.

“LEW. B. HARRIS,

“M. H. TURRILL.”

Plaintiff claimed as the assignee of Waugenheim & Blum.

On the trial, plaintiff, to prove the sums advanced on the contract, offered in evidence the following certificate:

“**EXHIBIT B.**—This certifies that the Silver Mountain Toll Road Company is indebted to Waugenheim & Blum, by virtue of an agreement made at Sacramento on the 10th day of January, 1864, by L. B. Harris and the undersigned, on behalf of the said Silver Mountain Toll Road Company, for certain bills and vouchers, in the sum of thirty-seven hundred and thirty-six dollars and forty-six cents, (\$3,736.46,) whereof three thousand dollars (\$3,000) to draw interest from February 1st, 1864, the remainder from March 1st, 1864. This agreement

Argument for Appellants.

does not include the amount said Waugenheim & Blum now have against said toll road company, contracted prior to the 10th day of January, 1864, (being a judgment.)

“SAN FRANCISCO, March 3d, 1864.

“ M. H. TURRILL,

“Superintendent Silver Mountain Toll Road.

“LEW. B. HARRIS.”

Defendants objected to its being received in evidence, and the Court overruled the objection.

The amount admitted by Exhibit B to be due, was the full amount for which Johnson and Phillips had drawn orders under the contract.

Defendants, on their part, offered to prove that Waugenheim & Blum did not pay the face of the orders to those who presented them, but purchased them at a discount, for the purpose of showing that there was less due on the contract than the face of the orders as admitted in Exhibit B.

On plaintiff's objection, the Court ruled out the testimony. The defendants appealed.

The other facts are stated in the opinion of the Court.

H. H. Hartley, for Appellants.

This settlement shows that Waugenheim & Blum intended to hold the company liable to them for the whole amount of the orders, in addition to the liability to them for such amounts as they might have bought up the orders at, and this we contend to be the legitimate interpretation of the last instrument.

We think that the instrument marked Exhibit B had nothing to do with this case, was clearly irrelevant, and should not have been read in evidence under defendants' objection, and in admitting it, and making it the base of judgment, the Court materially erred.

As this last agreement was not the foundation of the action, the plaintiff and intervenors should not have been permitted to have introduced it in evidence. (*Green v. Palmer*, 15 Cal. 411; *Garvey v. Fowler*, 4 Sanford, 667; *Mann v. Moorewood*, 5 Sanford, 559; *Vansanvoord's Pleadings*, Vol. I, 776.)

Argument for Respondent.

The rule that excludes parol evidence only applies to *contracts*, and not to an acknowledgment of either payment or indebtedness. In this, therefore, the Court erred in excluding the testimony offered by the defendants. (Greenleaf on Evidence, Vol. I, Sec. 305.)

Coffroth & Spaulding, for Respondent.

The paper evidencing the settlement (the paper marked B) is not set forth in the pleadings, and when an instrument is neither set out in the pleadings by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation, not referring to it expressly in any way whatever, a variance will not be fatal if the substance of what is alleged be proved. (Phillips' Evidence, Part I, Vol. III, p. 692; Greenleaf's Evidence, Vol. I, Sec. 69; *Castro v. Wetmore*, 16 Cal. 380; *Ferguson v. Howard*, 8 Cranch, 408.)

Appellants claim that they should have been permitted to *falsify* the settlement as proved by Exhibit B.

There is nothing in the answer showing that the defendants were ignorant, at the time of signing the instrument, of any of the facts upon which the settlement was based, and consequently there was no ground for permitting them to surcharge and falsify. (*Baker v. Biddle*, Baldwin's R., Vol. I, 417.)

There was a settled account; and where an account has been stated between the parties without fraud or coercion, and the statement evidenced by a written agreement, signed by the parties, showing the terms of the settlement and how they were to be bound thereby, the party should be held to the terms of such written agreement, and the account should not be opened. (*Troup v. Haight*, Hopkins' Ch. Rep., Vol. I, p. 268; see, also, 2 Atk. 189; 4 Cranch, 309; 1 Ch. Cases, 289; 1 Vernon, 180; 2 Atk. 119; 9 Ves. 265; 11 Wheat. 256; 2 Ves. 566; Story's Equity, Vol. I, pp. 500, 501; 1 McCord's Ch. R. 161.)

Where there has been a settlement of accounts, and each

Opinion of the Court — Shafter, J.

party is innocent, and there is no concealment of facts which the other party ought or has a right to know, and no surprise or imposition exists, the mistake, whether mutual or unilateral, is treated as laying no foundation for equitable interference, and is strictly *damnum absque injuria*. (*Belt v. Mehan*, 2 Cal. 160.)

Accounts *settled* cannot be set aside but for fraud, or surcharged and falsified but for error. (*Branger v. Chevalier*, 9 Cal. 361.)

By the Court, SHAFTER, J.

The plaintiff sues as assignee of Waugenheim & Blum. The assignment is denied by the defendants in their answer. Waugenheim & Blum intervened, alleging that they were and ever had been the owners of three fourths of the claim in suit, and praying judgment for the amount. The case was tried by the Court and judgment was entered for the plaintiff and intervenors to recover of the defendants the whole claim as an entirety; and it was further ordered and adjudged that the plaintiff was entitled to one fourth of the amount and the intervenors to the other three fourths.

First — The evidence of the plaintiff to prove that the entire claim was assigned to him, was an indorsement in blank by Waugenheim & Blum of a document signed by the defendants, in which the amount due on the contract in suit was stated at three thousand seven hundred and thirty-six dollars and forty-six cents.

Though it was in fact understood by the parties that the beneficial interest to pass by the assignment was limited to one fourth of the claim, still the plaintiff, as holder of the legal title, could sue for and recover the whole amount. It was competent, however, for the assignors to assert their equitable right by intervening in the action. Had they not intervened they would have been bound by the direct and legal operation of the judgment. (*Horn v. The Volcano Water Company*, 13 Cal. 62.)

Second — Exhibit "B," (the document before mentioned,) signed by the defendants, was admissible in evidence for the purpose of proving the amount due under the contract upon which the complaint was framed. That contract was not merged in the agreed statement of the amount due upon it.

Though the statement speaks of the contract as having been made by the defendants on behalf of the Silver Mountain Toll Road Company, yet it is apparent on inspection that the defendants contracted as principals; and furthermore, the pleadings show that the company was but a common partnership, of which the defendants were the principal, and, so far as was known to the intervenors, the only members. We therefore consider the agreed statement given in evidence, as relating to a debt due from the defendants personally under the contract declared on.

There can be no just pretense that either the contract or the statement of the amount due have anything to do with the Statute of Frauds. The contract was an original undertaking on the part of the defendants, and not a promise to pay the debt of another; and in view of the identity between the Toll Road Company and the defendants, it is apparent that whatever is said in the statement about the company is said in effect by the defendants of themselves.

The statement was, however, but an admission on the part of the defendants of the amount due from them, and they are not estopped from showing the admission to be inaccurate. Admissions which have not been acted on, and which the party may controvert without any breach of good faith or evasion of public justice, though admissible in evidence, are not conclusive against him. It follows that the ruling of the Court, excluding the defendants' evidence to show error in the written admission of the amount due and payable in gold under the terms of the contract, was erroneous.

Judgment reversed and new trial ordered.

Mr. Justice RHODES expressed no opinion.

Statement of Facts.

ALEXANDER BLANC v. JOHN G. KLUMPKE.

DEMURRER FOR AMBIGUITY.—A demurrer to a complaint for ambiguity and uncertainty, should point out specially in what the ambiguity or uncertainty consists, or it will be disregarded.

NUISANCE IN A HIGHWAY BY WATER.—An action to abate a nuisance erected in a highway by water, obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land.

NUISANCE IN HIGHWAY INJURIOUS TO PRIVATE PROPERTY.—If a nuisance in a highway only affect the plaintiff, in common with the public at large, in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same.

NUISANCE A QUESTION OF FACT.—If the complaint aver that certain obstructions placed in a highway are an obstruction to the free use and enjoyment of the plaintiff's private property, the question whether such obstructions amount to a nuisance or not, is one of fact for the jury.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint averred that the plaintiff was the owner of a lot situated on the water front of the City and County of San Francisco, and that the water on the easterly side of and adjoining the lot was a highway and navigable for boats and vessels, and that portion of the bay was the property of the State, and that boats and vessels had been in the habit of frequenting there for trade and commerce, and that plaintiff had erected valuable improvements on his lot, and derived great pecuniary advantage from the said commerce, and that defendant had driven piles and constructed tenements in the bay on the easterly side of plaintiff's lot by which boats and vessels were prevented from approaching his lot. The prayer asked for damages, an injunction, and that the piles and tenements be abated as a nuisance. The defendant demurred to the complaint, the demurrer was sustained, plaintiff declined to amend, and judgment was rendered for defendant. Plaintiff appealed from the judgment.

The other facts are stated in the opinion of the Court.

Joseph H. Moore, for Appellant, argued that the complaint stated facts sufficient to constitute a private nuisance, and

cited *Stiles v. Laird*, 5 Cal. 122; Black. Com. p. 216, title nuisance; 2 Greenleaf on Evidence, Secs. 465-468; 3 Starkie on Ev., 4 American Ed., marginal page 993; Story's Eq. Jur. Sec. 926; *Lansing v. Smith*, 8 Cowen; *Howard v. Lee*, 3 Sandf. 281; *First Baptist Church v. Schnectedy & Ny. R. R. Co.*, 5 Barb. 79; *Clark v. Mayor of Syracuse*, 13 Barb. 32; *Davis v. Mayor and Council of New York*, 4 Kernan, 526; *Mills v. Hall et als.*, 9 Wend. 315; *Dygert v. Schenck*, 24 Wend. 446; *Myers v. Malcolm*, 6 Hill, 92; *Harrison v. Sterrett*, 4 Harris and McHenry; and *Miehau v. Sharp*, 28 Barb. 428.

S. M. Wilson, for Respondent, argued that the acts complained of did not constitute a nuisance for which a private action would lie, and that all obstructions to navigation without direct authority from the Legislature were public nuisances, and cited Angell on Tide Waters, 111, *et seq.*, citing cases (2 Ed.); Angell on Watercourses, 616, *et seq.*, (5 Ed.); Id. 623, *et seq.*; 2 Hawk. C. 25; *Commonwealth v. Gowen*, 7 Mass. 378; *Rex v. Harris*, 4 T. R. 202; 2 Russell on Cr. 340; *Rex v. Russell*, 6 East, 427; *Turnpike Road v. The People*, 15 Wend. 267; see Buller's N. P. 26; Carth. 194, 451; 3 Bl. Com. 216-219; 4 Id. 167; *Iverson v. Morse*, 1 Salk. 15; 1 Co. Litt. 56-166; Cro. El. 9-664; Lord Raymond, 493; 2 Saund. 115; *Cope v. Marshall*, 2 Wilson, 51.

By the Court, SANDERSON, C. J.

We are not prepared to say that the complaint in this case does not state a cause of action in favor of the plaintiff. Had ambiguity and uncertainty been the ground of demurrer we should have been inclined to sustain the Court below; but that ground is not relied on, nor could it be, for the reason that the ambiguity, if such exists, is not specially pointed out in the demurrer.

Although the complaint in that respect is somewhat ambiguous, we regard the plaintiff as alleging an obstruction by the

defendant of the highway by water, as the same existed prior to the passage of the Act of the 24th of April, 1863, and also of the highway by land established by that Act, to his private prejudice. The theory of the complaint, as we understand it, is that the defendant has no legal right to obstruct the navigation of the bay in front of the plaintiff's water line so long as the Harbor Commissioners do not proceed to convert the space in question into a highway by land as authorized by the aforesaid Act, and that when the Harbor Commissioners have so converted the same, he then has no right to obstruct the highway by land so created and established. As already intimated, the complaint is a little obscure in this respect; but so far as the rights of the parties to this action are concerned, it can make but little difference whether we regard the space alleged to be obstructed by the defendant as a highway by water or a highway by land; since in either case, the rights of the plaintiff in the premises are the same, and are founded upon the same legal principles; and the acts of the defendant are equally obstructive to both.

The suggestion of counsel for the defendant that for aught that appears in the complaint the defendant may be engaged in converting the highway by water into a highway by land under the direction and supervision of the Harbor Commissioners is without substantial foundation. The language of the complaint is that the defendant has appropriated the public thoroughfare in question to his private and exclusive use, and has built and constructed and is proceeding to build and construct tenements and other improvements thereon, and that he claims the same as his private property and asserts his right and intention perpetually hereafter to hold and possess, and at his pleasure to occupy and build upon the same, which is entirely inconsistent with the idea suggested. That the alleged obstructions are of a character appropriate to such a change in the thoroughfare or that they are being placed there by or under the direction of the Harbor Commissioners, is therefore, in our judgment, not only negatived by the whole tenor of the complaint but by its express terms.

That the alleged acts of the defendant amount to an obstruction to the navigation of the bay at the point in question and likewise to the use of the space as a highway by land, does not, we think, admit of debate. If so, the alleged obstructions must be at least a public nuisance and indictable as such. This does not seem to be seriously controverted by counsel for the defendant, but it is insisted that, admitting the obstructions in question to be a public nuisance, the complaint does not demonstrate that they also constitute as to the plaintiff a private nuisance within the statute (Practice Act, Section 249) for which he may have his private action. Undoubtedly if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action, but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with and to some extent prevented, can it be said he suffers only in common with the public at large? Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance, and the subject of an action; and it is further provided that such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment of the Court the nuisance may be enjoined or abated and damages awarded. (Sec. 249, *supra*.) Whether certain alleged obstructions amount to a nuisance or not, is not a question for the Court but for the jury to decide. (*Gunter v. Geary*, 1 Cal. 462.)

Now it is alleged by the plaintiff in express terms, that by reason of the alleged obstructions he is deprived of the free and unobstructed use and enjoyment of his property, and that access and egress to and from the same is obstructed and cut off on the easterly side thereof towards the Bay of San Francisco, and that the rental value thereof is greatly diminished thereby. Whether this be so or not is the thing to be tried,

Points decided.

and we think the facts are sufficiently alleged to entitle the plaintiff to the opinion of a jury thereon.

As to whether some of the damages alleged may or may not be too remote we express no opinion.

Judgment reversed and cause remanded for further proceedings.

Mr. Justice RHODES expressed no opinion.

HORACE W. CARPENTIER v. J. H. N. GARDINER.

WILL AS EVIDENCE.—A will is not a conveyance within the provisions of the Act concerning conveyances, which can be read in evidence upon the certificate of proof, or of acknowledgment by a Notary.

IMMATERIAL ERROR.—A judgment will not be reversed for an error which is immaterial.

CHANGE OF FINDINGS OF FACTS.—A Judge cannot change his findings of facts in a material particular after the entry of judgment on the findings and the adjournment of the term.

REMISSION OF DAMAGES, OR NEW TRIAL.—If the findings are not sustained by the evidence on a question of damages, the Court may require the plaintiff to remit the damages, or submit to a new trial.

OUSTER OF A CO-TENANT.—A denial of the title of a co-tenant by a tenant in common in the possession of land owned by the two as tenants in common, is evidence of an ouster of the co-tenant.

SET-OFF OF VALUE OF IMPROVEMENTS AGAINST DAMAGES.—The Court cannot, in an action to recover lands, set off the value of improvements against the damages, if the defendant does not desire it.

VACATING A FINDING BY APPELLATE COURT.—If, in an action to recover lands, the Court finds damages, but gives judgment for possession without damages, and the plaintiff appeals from that part of the judgment refusing damages, and the defendant appeals from the order denying a new trial, the appellate Court may vacate the findings as to the damages if not justified by the evidence.

CONFLICT OF TESTIMONY.—If, in an action to recover lands, the testimony of five witnesses who know the premises, on a question of damages, is contradicted by one who testifies with respect to a much larger tract, including the premises in dispute, but without knowing their location, it is not such a conflict of testimony as will preclude the appellate Court from setting aside a finding in accordance with the testimony of the one.

FINDING OF FACTS.—The appellate Court will not find the facts upon the evidence in the record.

RELEASE OF CLAIM FOR DAMAGES IN SUPREME COURT.—If the Court below finds damages in an action to recover lands, but gives judgment for possession only, and the appellate Court determines that the finding is not sustained by the evidence, the judgment, on an appeal by both parties, will be affirmed, if the plaintiff releases his claim for damages.

Statement of Facts.

CASES AFFIRMED.—*Carpentier v. Webster*, 27 Cal. 524, and *Carpentier v. Mitchell*, *post*, affirmed.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

This was an action to recover possession of a tract of land containing eight hundred and fifty acres, parcel of the Rancho Laguna de los Palos Colorados, granted by the Mexican Government to Juan Bernal and Joaquin Moraga, and for damages for its detention.

Juan Bernal died in 1847. Plaintiff offered in evidence, as a conveyance of real estate, the will of Bernal, made in March, 1847, with the proof of its execution by one of the subscribing witnesses thereto before a Notary Public, and with a certificate of its record as a deed in the records of Contra Costa County. Defendant's attorney objected to the same because its execution had not been proven, but the Court overruled the objection. Plaintiff then proved that by proper mesne conveyances he had acquired the interest of the devisees in the will. It was admitted that the devisees in the will were the heirs at law of Bernal.

The defendant, in his answer, admitted that the plaintiff was a tenant in common with him in the premises. The plaintiff also to prove an ouster offered in evidence the separate answer of the defendant in an action to recover the same land, commenced by the plaintiff against the defendant and others in the District Court of Contra Costa County, on the 20th day of November, 1862, in which answer the defendant had denied plaintiff's title to the demanded premises, or to any portion thereof, and set up title in fee in himself.

After the adjournment of the term at which the cause had been tried, and the findings of fact filed and judgment entered, the Judge corrected his findings of fact by reducing the amount of damages found.

The other facts are stated in the opinion of the Court.

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H. W. Carpentier, in *pro. per.* for Plaintiff, argued that the admission of the will of Bernal in evidence was not error, and cited *Castro v. Castro*, 6 Cal. 161; *Grimes v. Norris*, 6 Cal. 625, and the Act concerning conveyances, Sec. 29.

He also argued that the denial by his co-tenant of his title, and claim of exclusive title in himself, was an ouster, and cited 2 Greenleaf Ev., Sec. 318; *Clymen v. Dawkins*, 3 How. U. S. 689; and 33 Missouri, 211.

Wm. Hayes, for Defendant, argued that the form of proof applicable to conveyances to entitle them to be received in evidence did not apply to wills, and cited Sec. 36, Act concerning conveyances. He also contended that at common law, the occupation of the entire common property by one tenant in common claiming the whole, and denying the title of his co-tenant, did not operate as an ouster, nor did it change or affect the possession of the co-tenant, and cited *Smales v. Dale*, Hobart, 120 — library edition, 265; *Carpenter v. Thayer*, 15 Ver. 555; and 4 Kent's Com., marginal page 369.

By the Court, SAWYER, J.

Some of the points relied on in this case have been already determined in the cases of *Carpentier v. Webster*, 27 Cal. 524, *Carpentier v. Mendenhall*, 28 Cal. 484, and *Carpentier v. Mitchell*, *post*.

Admission of a will in evidence.

The will of Bernal was improperly admitted in evidence without further proof of its execution. Admitting that its operation was to convey the title, a will is not a conveyance within the provisions of the Act concerning conveyances, which can be read in evidence upon the certificate of proof by a Notary. A will is excluded in express terms by the thirty-sixth section of the Act. But the error is immaterial; for it was admitted on the trial that the devisees of the will, under whom the plaintiff claims, were the heirs at law of the testator.

Change of findings of fact after adjournment of term.

The findings, as they were originally filed, must be regarded as the findings in the case. The Judge was not authorized to change them in material particulars after the entry of judgment upon the findings, and the adjournment of the term. Defects might be supplied at the proper time and in the proper mode, in pursuance of the Act of 1861. In denying a new trial, the Judge, if he thought the evidence insufficient to justify the findings as to the amount of damages, might have required the plaintiff to remit the excess as a condition of the refusal, and this, rather than a modification of the findings, would have been the proper practice.

The point, that there can be an ouster by a tenant in common of a part of the entire tract held in common, was settled in *Carpentier v. Webster*. This point being determined, the evidence in our judgment is sufficient to sustain the finding that there was an ouster. The overwhelming weight of authorities as to what acts are sufficient evidence to establish an adverse holding, from which an ouster may be inferred, sustains this conclusion.

The Court erred in the conclusion that the value of the improvements should be set off against the damages, for the reason, if for no other, that the defendant did not ask it, but, on the contrary, protested against it. Neither party desired it. The result, however, was, that the plaintiff only recovered the possession without damages.

Findings not warranted by the evidence.

The plaintiff appeals from that part of the judgment denying damages, while the defendant appeals from the whole judgment, and from the order denying a new trial. One of the grounds of the motion for new trial, is, that the evidence does not justify the findings upon the value of the rents and profits. If this point is well taken the findings must be vacated, and there will be no basis left for the plaintiff's appeal. That the

evidence does not justify the finding upon this point is clearly manifest, whether the plaintiff is entitled to recover the value of the premises with or without the improvements put upon them by the defendant. Five witnesses of the defendant, who were acquainted with the premises, testified that, without the improvements placed upon the premises by defendant, they would be of no rental value; and some of them, that, with such improvements, the yearly value was from four hundred dollars to five hundred dollars per annum — the latter being the highest sum named; while one witness only testified, on the part of the plaintiff, that without the improvements, the land was worth fifty cents per acre per annum, and with them, one dollar and a half or two dollars per acre per annum. But on cross-examination he said, "I do not know the particular land Gardiner occupies; I know the Moraga Rancho; I speak generally of all the land on the Moraga Rancho." The whole rancho contains upward of thirteen thousand acres. This is the entire testimony. The finding is, that the land, without the improvements, is worth fifty cents per acre, and with them two dollars per acre — the highest sum named by the latter witness. In this case the evidence was overwhelming against the finding, and there is not such conflict as to bring it within the rule heretofore adopted by this Court. In fact it cannot be properly said that there is any conflict, for the plaintiff's witness testified as to the whole rancho, without reference to, or knowing the particular land in dispute; while defendant's testimony was directed to the land in controversy, with which the witnesses were personally acquainted. The testimony as to the value, then, did not have reference to the same subject matter, and the finding is wholly unsupported by evidence. It is but just to the Judge who tried the cause to say that he discovered his mistake and attempted, when too late, to correct it by subsequent modification. And his successor also, upon denying the new trial, directed similar modifications. The Court below, therefore, was dissatisfied with its findings, but was powerless to modify them in the mode pursued. It is not our province to find the facts upon the evidence in the record,

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and for this reason a new trial would be necessary if the plaintiff should insist upon damages. The plaintiff, in his brief, in case the Court is of the opinion that there was error in the finding, "offers to remit such portion of the sum mentioned in the finding as the Court may think proper." The finding does not afford the data for making any apportionment. This could only be done by assuming the functions of a jury, and finding the damages upon the evidence—a duty which is not devolved upon this Court. The entire damages must be remitted, or the judgment reversed and a new trial had. We suppose, from the offer made, that the plaintiff would prefer to remit the whole rather than to submit to the delay and inconvenience consequent upon a new trial.

It is, therefore, ordered that plaintiff have fifteen days within which to file in this Court a release of all damages claimed in this action, and that upon filing such release in due form, the judgment for possession be affirmed; but in default of filing such release, that the judgment of the District Court and the order denying a new trial be reversed and a new trial granted.

And it is further ordered that neither party recover costs of appeal as against the other.

Mr. Justice RHODES expressed no opinion.

JAMES W. GAUTIER v. JAMES L. ENGLISH.

JUDGMENT RENDERED BY DEFAULT, BEARING INTEREST.—A judgment by default, in a suit on a note drawing interest at more than ten per cent per annum, should not direct that the judgment bear interest at the agreed rate, unless the complaint pray that the judgment bear interest at the rate named in the note.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The facts are stated in the opinion of the Court.

H. H. Hartley, for Appellant.

Jo. Hamilton, and *Charles A. Tuttle*, for Respondent.

By the Court, SAWYER, J.

This is an action upon a promissory note to recover the sum of ten thousand dollars and interest at one per cent per month, and to foreclose a mortgage given to secure it.

The prayer of the complaint is for judgment for "ten thousand dollars and the interest thereon at the rate of one per cent per month since the first day of December, 1864, until rendition of judgment in this case," and for foreclosure and sale. Judgment by default was rendered March 9th, 1865, for ten thousand three hundred and twenty-six dollars and sixty-six cents, and it was provided in the judgment that the said sum should bear interest from the date of judgment at the rate of one per cent per month until paid.

The judgment being by default, and the plaintiff having demanded in his complaint interest only "*until rendition of judgment,*" the appellant claims so much of the judgment as allows interest *after* the rendition of judgment "at one per cent per month until paid" to be erroneous, because, to this extent, it exceeds the relief demanded in the complaint, and is in violation of section one hundred and forty-seven of the Practice Act, which provides, that, "the relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint."

The respondent, on the other hand, insists that section two of the statutes of 1850, relating to interest, prescribes what the judgment shall be upon contracts bearing a conventional rate of interest, and that, when such a contract is the basis of an action, it is the duty of the Court to direct by its judgment that said judgment shall bear interest at the stipulated rate, irrespective of the relief demanded in the complaint. The section, which was in force when the Practice Act was adopted, is as follows:

"SEC. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due,

on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment." (Statutes 1850, 92.)

But the question is not what judgment plaintiff's contract and the law relating to it entitles him to demand, and have entered upon such demand; but what judgment has he demanded, and does the relief afforded exceed that demanded in his complaint? The law and his contract give him a right to certain relief, but the Practice Act prescribes the mode by which he must obtain the relief to which he is entitled; and it says, that the measure of his relief, if there be no answer—no matter how much may be his due—"shall not exceed that which he shall have demanded in his complaint." There can be no misunderstanding the meaning of these terms. That the judgment for a greater rate than ten per cent is a portion of the relief necessary to be given in express terms in the judgment there can be no doubt. The judgment would bear interest from its date at the legal rate without any specific provision to that effect, for the law—section one—so provides. As no specific relief in the judgment is required to enable plaintiff to collect the statutory rate, no prayer for such relief is necessary. But to enable the plaintiff to receive a higher conventional rate of interest, it must be "specified in the judgment." This requires a special judgment—specific relief. It is as much specific relief as the foreclosure of a mortgage, or any other extraordinary relief. And there is no more reason for granting one kind of specific relief in face of the express provision of the statute, than another. The plaintiff in this case was, under the law and his contract, as much entitled to a judgment of upwards of ten thousand dollars, as that his judgment should bear the conventional rate of interest. He might, however, have demanded judgment for only five thousand dollars. Had he done so, we apprehend no one would have claimed, that a judgment for ten thousand dollars could be sustained under the provision of the Practice Act. What he

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did so was in reality to demand judgment for a specific, certain sum, less than he was entitled to demand—for he demanded judgment for ten thousand dollars and interest at one per cent per month from a specified date *until rendition of judgment*, and as soon as the date at which the judgment was to be rendered was ascertained, it was only necessary to make the computation to ascertain the precise sum demanded. If the plaintiff does not obtain the full measure of relief to which his contract and the law would have entitled him, it is because he failed to demand it, and it is his own fault. We think the relief granted exceeded that demanded in the complaint, and to that extent unauthorized. (*Raun v. Reynolds*, 11 Cal. 19; *Gage v. Rogers*, 20 Cal. 91; *Lattimer v. Ryan*, 20 Cal. 628; *Lamping v. Hyatt*, 27 Cal. 103; *Lane v. Gluckauf*, 28 Cal. 288.)

Ordered that the judgment be modified by striking out all that portion of the judgment allowing interest at one per cent per month subsequent to the rendition of judgment, and that appellant recover his costs of appeal.

JOSEPH W. REAY v. JOHN COTTER, GEORGE SPAN-
AGEL, AND JAMES IRWIN.

RIGHT OF ASSIGNEE OF LANDLORD TO REMOVE TENANT.—If a landlord sells the leased property and assigns to the purchaser the lease, and the tenant does not attorn to the purchaser, or recognize him as landlord, the purchaser cannot recover possession of the premises from the tenant under the Act concerning forcible entries and unlawful detainers.

CONVENTIONAL LANDLORD ALONE CAN REMOVE TENANT.—The right to remove a tenant under the Act concerning forcible entries and unlawful detainers is given to the conventional landlord alone, and not to his successor in the estate.

APPEAL from the County Court, City and County of San Francisco.

The action was brought for holding over after the expiration of the lease.

The other facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellant, argued that the interest of a lessor in lands was assignable, with its remedies, and cited *Van Rensaeller v. Smith*, 27 Barb. 104.

James B. Townsend, for Respondent, argued that the right of the plaintiff to the possession of the premises depended wholly on his ownership, which could not be tried in this action, and cited *Youngs v. Freeman*, 3 Green, N. J. 30; *Allen v. Smith*, 7 Hals. 199; *Childress v. McGehee*, 1 Ala. 133; *Holland v. Reed*, 11 Mo. 605; *Picot v. Masterson*, 12 Mo. 303; and *Devine v. Brown*, 35 Ala. 596.

By the Court, SANDERSON, C. J.

This is an action to recover possession of certain premises under the provisions of the Act concerning forcible enteries and unlawful detainers.

It appears upon the face of the complaint that the premises in question were leased to James Irwin, one of the defendants, by one Richard M. Treadway, who subsequently sold and conveyed the premises by deed to the plaintiff, and also assigned and transferred to him the lease in question, which was in writing; but it does not appear, and it is not alleged, that Irwin subsequently attorned to the plaintiff or in any manner recognized him as his landlord.

An answer was filed, setting up several defenses, which it is not necessary to notice, for we propose to consider the case as if before us on demurrer to the complaint. When the case was called for trial the defendants moved that the case be dismissed, on the ground, in effect, that the Court had no jurisdiction over the case made by the pleadings, which was, as claimed by defendants, substantially an action of ejectment, and not an action within the meaning of the Act concerning unlawful detainers. The motion was allowed by the Court, and the plaintiff has appealed.

The only question presented by the record is as to whether the plaintiff, being the vendee of the original or conventional landlord, and as to the lease merely his assignee, can avail himself of the remedy provided by the Act in question, the tenant never having attorned to him; it being claimed on the part of the defendant that the remedy in question is given only to the conventional landlord and not to his grantees, devisees, heirs or assigns, unless the tenant shall have attorned to them.

Regarding the plaintiff merely in the character of assignee of the lease, he certainly could not maintain this or any other action for the possession, for by the assignment of the lease he acquired no reversionary interest in the land, but merely a right to receive the rent. If, then, he can maintain the action, it must be solely upon the ground that he has succeeded to the original landlord's title, and by operation of law become entitled to all the rights and remedies which he had.

Upon inspection of the fourth section of the Act (Statutes 1863, p. 653), it will be found that this remedy is conferred only upon "the landlord," and is not given in terms at least to his successors in estate. Is, then, the vendee or devisee, or heir (for they are all in the same category) of the landlord or lessor a "landlord" within the meaning of that section?

The Act in question was designed to afford a summary remedy for the recovery of land as against a conventional tenant who holds over contrary to the terms of the lease, thereby relieving the landlord from the necessity of resorting to the more costly and dilatory remedy afforded by the action of ejectment. It was not intended to apply to any case where the title to the land could be made a question, but only to cases where from the nature of the relation between the parties no such question could be made because prohibited by law. Where the conventional relation of landlord and tenant exists the law does not permit the latter to dispute the title of the former. He is estopped by his lease. Hence in such a case the landlord is not required to make proof of his title, but he may rest upon the lease and proof of a compliance on his part

with the provisions of the Act touching a demand for the possession. In such a case title is not and cannot be made a question. Where, however, the conventional relation of landlord and tenant does not exist, the latter is not so estopped, there being no privity between him and the plaintiff, and he may deny the title of the latter and put him upon the proof of his reversionary estate. To such a case the summary remedy afforded by the statute in question was not intended to apply, and a plaintiff who cannot rest upon the lease and is compelled in addition thereto, to make proof of his title to the reversion must seek redress elsewhere. For him this remedy was not intended.

In the present case the plaintiff, by his own showing, is not the conventional landlord. He is an entire stranger to the lease under which, as he alleges, the defendant holds. At the time the lease was executed, he had no estate in the premises and no interest in the reversion. On the contrary, his estate has come to him since that time by purchase, and the defendant has not since such purchase attorned to him or in any manner recognized him as his landlord. Hence, before he can recover, he must prove his purchase from the defendant's lessor by the production of a deed sufficient in law to pass the estate, and must prove its execution and delivery; or, in other words, he must prove his title, which is precisely what he is not allowed to do in this form of action.

For authority in support of the foregoing views the following cases are cited: *Allen v. Smith*, 7 Halstead, 199; *Youngs v. Freeman*, 3 Green, New Jersey, 30; *Holland v. Reed*, 11 Mo. 606; *Picot v. Masterson*, 12 Mo. 303.

Judgment affirmed.

Mr. Justice RHODES expressed no opinion.

Statement of Facts.

THE BOARD OF COMMISSIONERS OF THE FUNDED DEBT OF THE CITY OF SAN JOSE v. COLEMAN YOUNGER.

RESCINDING AN EXECUTED CONTRACT FOR SALE OF LAND.—If a Board of Commissioners, having the title of the land of a city in trust for sale, adopt a rule to sell to occupants in possession at a certain price, and one in possession of seventy-two acres petitions to buy a tract stated to contain about seventy-two acres, giving courses, distances, and monuments in the petition, and the tract contains the seventy-two acres, and eighty acres in the occupation of another, and the Board have the means of ascertaining all the facts, and make a deed to the petitioner, a Court of equity will not rescind the contract at the suit of the Board.

FACTS NECESSARY TO OBTAIN RESCISSION OF EXECUTED CONTRACT.—Where a party seeks the rescission of an executed contract for the sale of land on the ground of a false suggestion, it must appear that the misrepresentation complained of was as to a material fact by which the party was induced to make the contract to his injury, and in relation to which he placed confidence the other, by reason of his not having the means of knowledge within his own reach.

MISREPRESENTATION WITHOUT INJURY.—A naked misrepresentation, however wrong in point of morals, unaccompanied by actual damage, does not afford ground for relief against an executed contract for the sale of land.

RESCISSION OF CONTRACT BY REASON OF SUPPRESSION OF FACT.—A contract will not be rescinded on account of a suppression of a fact by one party, unless the concealment resulted in injury, and the concealed fact was material, and one which the party was under some legal or equitable obligation to disclose.

MISTAKE IN NUMBER OF ACRES SOLD.—If land is sold by metes and bounds, with a statement of the number of acres, a mistake as to the number of acres affords no ground of action, unless it appears beyond controversy that quantity was one of the principal conditions of the contract.

WHEN VENDOR HAS MEANS OF ASCERTAINING QUANTITY OF LAND.—If the seller has the means of ascertaining the quantity of land and does not do so, equity will afford him no relief on the ground that the buyer misrepresented the quantity.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

This was an action to have the deed of the plaintiffs to the defendant, so far as the same included the land in the possession of Gish, declared fraudulent and void, and to compel the defendant to reconvey the same to plaintiffs. Plaintiffs recovered judgment, and on application of defendant a new trial was granted. Plaintiffs appealed from the order granting a new trial.

The other facts are stated in the opinion of the Court.

Opinion of the Court — Sanderson, C. J.

S. O. Houghton, and *R. F. Peckham*, for Appellants, argued that the evidence showed actual fraud because of the false suggestion as to quantity contained in the petition, and the concealment of the fact that Gish was in possession, and that if the mistake was innocently made on the part of Younger it was still a fraud, and cited *Morris v. Nixon*, 1 How. U. S. 118; *Irwin v. Robinson*, 13 Cal. 116, 126; *Hilliard on Mort.*, Ch. 111, Secs. 1 to 4.

J. M. Williams, *C. T. Ryland*, and *C. M. Younger*, in *pro. per.* for Respondent, argued that neither the complaint nor the evidence showed any fraud from which an action could lie, and cited *Green v. Covillaud*, 10 Cal. 317; *Herron v. Hughes*, 25 Cal. 555; *Taylor v. Fleet*, 4 Barb. 95; *Michael v. Michael*, 4 Iredell's Ch. 349; *Harris v. Taylor*, 15 Cal. 348; *Meeker v. Harris*, 19 Cal. 378; and *Murdock v. Chenango Insurance Co.*, 2 Comstock, 210.

By the Court, SANDERSON, C. J.

This is an appeal from an order granting a new trial upon the application of the defendant.

The facts of the case, as shown by the statement on motion for new trial, so far as a statement of the same is material to a proper understanding of the grounds of our decision, are substantially as follows:

On or about the 15th of December, 1860, the defendant, by his agent, C. B. Younger, made application to the plaintiffs by petition, in writing, for a conveyance from them to him of a certain tract of land held by them as trustees for the purposes and as provided in an Act entitled "an Act to authorize the funding of the unfunded debt of the City of San José and to provide for the payment of the same," passed April 21st, 1858. (Statutes of 1858, p. 193.) The petition described the land by metes and bounds, and courses and distances, concluding the description in these words: "containing about seventy-two acres of land." For the purposes of their own government

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in the sale of lands, the Commissioners (the plaintiffs) had established a rule to the effect that where the land was occupied they would sell only to the actual occupant thereof, and for no sum less than one dollar and twenty-five cents per acre; which rule, with one or two exceptions, had been uniformly observed by them, and in no case had land been sold at less than one dollar and twenty-five cents per acre. This rule of the Board of Commissioners was known to the defendant's agent at the time he presented his petition. Aside from the contents of the petition, the agent of the defendant made no representations to the Commissioners as to the quantity or possession of the land, nor was he asked any questions by them as to either. All that passed between them was an inquiry on the part of the agent as to how much he would have to pay for the land; in response to which he was told that he would have to pay ninety dollars, which sum he then and there paid, and ten days thereafter received from the Board a conveyance of the land, following the description in every respect as set out in the petition. The conveyance was drawn by the defendant's agent. At the date of these transactions maps of the land held by the Board of Commissioners, as aforesaid, were in the possession and custody of the Board.

Subsequently it was discovered that the description in the deed contained one hundred and fifty-four acres instead of seventy-two; and that at the date of the foregoing transactions the defendant was in the actual possession of only seventy-two acres thereof, and the remaining eighty-two acres were in the actual possession of one Gish, the two tracts being separated by a fence belonging in part to the defendant and in part to Gish. The fact that the description in the petition and deed contained more than seventy-two acres, and the further fact that the defendant was not in the actual possession of the overplus, was in point of fact unknown to the members of the Board at the time the deed was executed, and the same would not have been so executed had they been fully advised as to the truth, because it would have been contrary to their rule to have done so.

After the Board had discovered these facts, they requested the defendant to reconvey the eighty-two acre tract, and prepared and tendered to him a deed for that purpose, which the defendant refused to execute; but the Board did not tender back the ninety dollars which the defendant had paid, nor did they offer to rescind the entire contract; nor did the defendant base his refusal upon the ground that the last named tender and offer were not made, but he professed ignorance of the fact that his deed embraced more than seventy-two acres and included eighty-two acres in the possession of Gish, and offered to pay for the latter at the rate of one dollar and twenty-five cents per acre. This claim of ignorance, however, it is claimed by counsel for appellant (and we think justly so) is fully answered by the statement of his agent, while on the witness stand, that the defendant told him that he wanted to include the Gish tract, because he claimed to have title to it.

Although, as claimed by himself, Gish had been in possession since 1851, he had never made application to the Board for the purchase of the eighty-two acre tract.

The gravamen of the complaint is that the defendant fraudulently represented to the Board that the description in his petition did not contain more than seventy-two acres, and that the whole tract therein described was in his possession, and that he fraudulently suppressed the fact that it contained one hundred and fifty-four acres, and that Gish was in the actual possession of eighty-two acres, part and parcel thereof. The Court, however, did not find this to be true, but found that there had been a mutual mistake as to the quantity and possession of the land.

In the foregoing statement of the case we have omitted certain facts which make a part of the defendant's case, but we have aimed to state fully such facts as constitute the plaintiff's case; and we have thus restricted the statement because we are of the opinion the plaintiffs are not entitled to any relief upon the case made by them.

The gravamen of the complaint as already stated is the alleged fraudulent representation of the defendant as to the

quantity of the land contained in the description thereof given by him in his petition, and the alleged fraudulent suppression of the fact that another and not himself was in possession of a part thereof.

Rescission of a contract by a Court of Equity.

Where a party seeks a rescission of a contract on the ground of a false suggestion, it must appear that the misrepresentation complained of was as to a material fact, by which the party was induced to make the contract, and that he was actually misled thereby to his injury; for a naked misrepresentation, however wrong it may be in point of morals, unaccompanied by any actual damage or injury, does not afford ground for relief against an executed contract. Neither Courts of law nor equity enforce obligations or redress wrongs which are such only *in foro conscientiae*, and are followed by no loss or damage. It must also appear that the misrepresentation was in regard to some matter touching which the party claiming to have been deceived has placed a known trust and confidence in the other by reason of his not having equal means of knowledge with him as to the true conditions. But a Court of equity will not relieve a party from a contract on the ground of misrepresentation where no confidential relation exists between the parties, and where the means and sources of knowledge being equally accessible and open to both, the party complaining has no right to place reliance upon the statements of the other; for the law aids the vigilant, not the idle, and will not undertake the care of persons who will not, with the means at hand, take care of themselves. (1 Story's Eq. Juris. Sec. 195, *et sequens*.)

So, where the ground of complaint is the suppression of a fact, the same general principles apply. The fact concealed must be a material one, and the concealment must result in some injury or prejudice to the party complaining. Moreover the fact concealed must be one which the one party, upon the ground of confidence or otherwise, is under some legal or equitable obligation to disclose to the other, and which the

latter, in the language of Mr. Justice Story, has a right to know, not merely *in foro conscientiae*, but *juris et de jure*. (1 Story's Eq. Juris. Sec. 204, *et sequens*.)

Interrogate the facts of the present case by the light of the foregoing principles and we are of the opinion that they do not stand the tests therein established.

No confidential relation exists between the parties. Neither has means of knowledge or sources of information which the other has not. They occupy with respect to each other the naked relation of buyer and seller. The facts most material to the latter are quantity and possession. (We assume for the purposes of our decision, that they are material.) The land in respect to which the proposed contract is to be made is in the immediate vicinity and equally accessible to both, and moreover the maps and surveys thereof are in the immediate custody of the seller and open to his inspection. Thus he either has all the information or can readily obtain it, which he needs in order to make a contract which will be fair and satisfactory to himself, and he had no occasion or necessity for relying, in any respect or particular, upon the statements of the buyer. Under these circumstances the buyer proposes to purchase the land in question, submitting his proposition in writing in the customary mode, and accompanying it with a deed in each of which the land which he proposes to buy is alike described by courses and distances, metes and bounds and quantity. He volunteers no statement as to the fact of possession or quantity and is asked no questions as to either. He merely asks the price in gross, and on being told, pays it. True he knows that the seller has a rule to the effect that he will sell to the occupant in preference to any other purchaser; but he also knows that the rule is merely an arbitrary one, not binding upon him much less upon the buyer, and that he can depart from it if so disposed. The seller takes the money, retains the deed for fifteen days, thus affording him ample time and opportunity for investigation, (which entirely negatives

the idea that he was taken by surprise,) and then delivers it to the buyer duly executed and acknowledged.

No representations were made except through the petition and deed. Upon the fact of possession they were both silent. Upon the fact of quantity they both told two stories, one true and the other false, or we will assume that they told two stories, one true and the other false, thus, contrary to the rule of law, attaching to the language "containing about seventy-two acres" the same force and effect which is accorded to landmarks accompanied by courses and distances upon the question of quantity. The former did not profess to state the precise quantity, while the latter supplied the data from which the exact quantity could be ascertained by computation; or if, as claimed by counsel for appellant, the courses and distances are inaccurate, the landmarks given afforded the means for their correction with a view to the computation. In view of these facts, it is at least doubtful whether there was any misrepresentation at all as to quantity, especially in view of the fact that, after all, the entire representation was a mere description of the land, given mainly for the purposes of a formal conveyance, rather than as a statement of facts for the purpose of effecting a sale and purchase, and in view of the law, which is to the effect that the language "containing about seventy-two acres," or any equivalent language in a deed is mere matter of description, and of but little if any account for that purpose even, and always gives way to courses and distances, which in turn give place to metes and bounds. Hence, where land is sold by metes and bounds, concluding with a statement of the number of acres, a mistake as to the number of acres affords no ground of action by either party against the other, unless it be made to appear, beyond controversy, by clear and positive testimony, that quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase. (*Marvin v. Bennett*, 26 Wend. 169; 8 Paige, 312.) The expressions used in such cases "about so many acres," or "so many acres, more or less," being openly indeterminate and uncertain,

show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned, is placed entirely upon the description by metes and bounds; so if it should, upon an after computation turn out that there is a greater or less number of acres than stated, there can be no recovery for the excess or deficiency, as the case may be, especially where, as in the present case, the complaining party has had every opportunity, by the exercise of ordinary vigilance, of guarding against any mistake in that respect. (*Marvin v. Bennett*, *supra*; *Northrop v. Sumner*, 27 Barb. 196; *The Morris Canal Company v. Emmett*, 9 Paige, 168.)

But even assuming that it did amount to such a misrepresentation on the part of the defendant as to the quantity embraced within the boundaries given by him as would, under some circumstances, entitle the plaintiffs to relief in a Court of equity, we think that such circumstances are entirely absent from this case and that any loss or injury sustained by them is to be attributed to their own negligence and *laches*. They had the means of ascertaining the true quantity at hand, either by an inspection of the surveys and maps in their possession, or by visiting and inspecting the premises themselves which were in the immediate vicinity and as accessible to them as to the defendant. They not only did not resort to either of those sources of information, but they did not even take the precaution of asking the defendant as to the accuracy of his estimate of the quantity. Having thus failed to exercise even the most ordinary care and diligence, a Court of equity will not listen to their complaint. (1 Story's Eq. Juris., Sec. 200.)

What has been said as to the alleged misrepresentation as to quantity applies also as to the alleged concealment of the fact that another and not the defendant was in the actual possession of a part. As already remarked, the contracting parties stood at arms length, each acting upon his own judgment, and neither needing or asking information from the other. If there was, therefore, any legal or equitable obligation cast upon the defendant to disclose the fact that he was not in the

possession of the entire tract, it was so cast only by force of the rule adopted by the Board, not to sell except to the actual occupant. But that, as already stated, was an arbitrary rule of private conduct, not binding upon the Board, and certainly not upon any one else, and one which the Board could not adhere to, if the actual occupant failed to apply for the land within a reasonable time, without violating their trust, and, to a certain extent, defeating the object for which it was created. The Act of the Legislature creating the trust makes no provision for such a rule, and while we admit that its adoption by the Board was unobjectionable and proper, it cannot be regarded as imposing either an equitable or legal obligation upon any one.

We have not noticed the technical points made in the case, because we deemed it best for the interest of both parties to ground our decision upon the merits, all the facts being before us.

The order granting a new trial is affirmed.

Mr. Justice RHODES, being disqualified, did not participate in the decision.

WILLIAM T. WALLACE v. THE MAYOR AND COMMON COUNCIL OF THE CITY OF SAN JOSE.

POWER OF MAYOR AND COMMON COUNCIL OF SAN JOSE TO SUE.—The Mayor and Common Council of the City of San José can sue in the corporate name for the recovery of such real property as belongs to the city.

POWER OF MAYOR AND COMMON COUNCIL OF SAN JOSE TO CONTRACT.—The Mayor and Common Council of the City of San José have no power to enter into a contract by which the city becomes obligated to pay an attorney at a future time a sum of money, if he succeeds in placing the city in possession of certain real estate, unless there is money in the Treasury at the time to pay the same, after paying the expenses of the city government and all other demands legally due.

CONTRACT BY SAN JOSE CREATING DEBT TO ARISE IN FUTURE.—The Mayor and Common Council of San José have no authority to bind the city by the creation of a debt to arise in future, unless there is money in the Treasury at the time to pay the same, after paying the expenses of the government and all other demands legally due.

Opinion of the Court — Currey, J.

CONTRACT OF MUNICIPAL CORPORATION.— A municipal corporation is not bound by a contract made by its officers, unless the Act of incorporation delegated the power to make it.

CONTRACTING WITH MUNICIPAL CORPORATION.— Those who contract with a municipal corporation are bound to know the extent of the power of its officers.

EVIDENCE IN SUIT AGAINST SAN JOSE.— In a suit against the Mayor and Common Council of the City of San José on a contract creating a debt, the defendant may prove that at the time the contract was made there was no money in the City Treasury except what had been appropriated to pay current expenses of the city government and its legal indebtedness.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Francis E. Spencer, for Appellant, argued that the corporation was not bound by the contract, as it created a debt within the meaning of the twelfth section of the Act of incorporation, and cited *People v. Johnson*, 6 Cal. 500; *Nouquez v. Douglass*, 7 Cal. 69; *The People ex rel. McCullough v. Pacheco*, 27 Cal. 175.

William T. Wallace, *in pro. per.*, for Respondent, argued that a municipal corporation has all the incidental powers under our system which it possessed at common law, unless the Act creating it denied or limited these powers, and cited *Kyd on Cor.* p. 13; and *Angell & Ames on Cor.* p. 1. He also argued that the contract in question did not create a debt, and cited *State of California v. McCauley*, 15 Cal. 454. He also argued that, as the power to contract a debt was not taken away if there was money in the Treasury to meet the same, that the power to appropriate moneys afterwards to come into the Treasury was unlimited, and cited 16 Cal. 24; *Id.* 249; and 27 Cal. 208.

By the Court, CURREY, J.

This action was brought on a contract, under seal, purporting to have been executed on the 8th of April, 1863, by the

defendant, a municipal corporation, of the first part, and the plaintiff, an attorney and counsellor at law, of the second part.

This contract, in the first place, recites that the City of San José at that date claimed to be the owner and entitled to possession and control of certain lots and parcels of land situate within its corporate limits, which before then were devoted and dedicated by the city, through its corporate authorities, to educational purposes, and that divers persons had entered into the possession of several such lots and claimed to be the owner of them, and refused to surrender them to the city or its authorities; and that the city and its authorities desired to reduce the same parcels of land to their possession and control for educational purposes; and that to accomplish this end, the parties of the first part, the Mayor and Common Council, in behalf of the city and for themselves and their successors in office, had retained and employed the plaintiff as an attorney at law to institute and conduct such actions on behalf of the city as was or should be necessary for the recovery of the possession of such of the lots and parcels of land as might be recoverable. Then follows a covenant on the part of the plaintiff to render his services as an attorney at law faithfully and diligently, in and about the subject matter for which he was employed. The compensation which he was to have for his services, the contracting parties agreed should be fifty per cent of the cash value of each of the lots or parcels of land which should be recovered in any of the actions that might be brought. Such compensation was to be paid in the "current gold and silver coin of the country," whenever the city or its authorities should obtain the actual possession of the lot or lots of land recovered, provided the plaintiff's compensation in the aggregate should never exceed eight thousand dollars.

Soon after the date of this contract the terms of the then incumbents of the offices of Mayor and Common Council expired, and a new board of municipal officers succeeded. At a meeting of this new board of officers, held on the 4th of May, 1863, a resolution, preceded by a preamble assigning the reason for it, was passed, declaring that they, the Mayor and

Common Council, deemed the said contract "a violation of good faith, justice, law and equity, as also of the provisions of the city charter;" and further declaring that they would not hold themselves, in their municipal capacity, bound by any of the conditions set forth in such contract.

The plaintiff brought his action, alleging in his complaint and proving on the trial that he entered upon the performance of the contract, and actually performed certain services in the investigation of the rights of the defendant to the several lots and parcels of land referred to in the agreement, after which he was served with a copy of the resolution last mentioned. He also averred that at all times after the execution of the contract until the commencement of the action he had been ready and willing to perform it, and had kept and performed it on his part, but that defendant had and still refused to perform it on his part, and refused to permit the plaintiff to institute any action or actions for the recovery of the possession of the said lots of land or any part of the same. Relying upon the matters stated as a breach of the agreement on the part of the defendant, the plaintiff alleged that he was entitled to have and receive of the defendant eight thousand dollars in gold and silver coin. By an amendment, the plaintiff added to his original complaint a count in assumpsit upon a *quantum meruit*, alleging a breach of the defendant's promise to his damage in the sum of three thousand dollars.

To both counts of which the complaint consisted, the defendant demurred on various grounds, among which are the following:

First — That the complaint does not state facts sufficient to constitute a cause of action.

Second — That it does not appear from the complaint that any legal or valid contract was entered into between the parties.

The demurrer was overruled, whereupon the defendant answered, traversing every material allegation of the complaint.

At the trial the defendant offered to prove:

Opinion of the Court — Currey, J.

First — That all the right, title and interest that the defendant ever had in the premises referred to in the contract had long before the date of it vested and yet remained in the Board of Commissioners of the Funded Debt of the City of San José, and that said premises did not belong to the defendant at the date of the contract.

Second — That when the contract was executed there were no funds or money in the Treasury of the city, or belonging to the corporation, appropriated for the recovery of the possession of said premises; also, that no appropriation in behalf of the corporation of any money belonging to the city or in its Treasury for the purpose of recovering said lots or any portion of them had been made; also, that at that time there was not, nor since then had been, any funds or money belonging to the corporation or in the Treasury of the city, which was not appropriated for the purpose of paying the current expenses of the city government and the legal indebtedness of the city which had accrued before that time.

Third — That no report was ever made or published in relation to the expenditure contemplated by the contract; and that no election had ever been called or held for the purpose of voting for or against any such proposed expenditure.

All this evidence was excluded on the ground that the same was irrelevant, and to this ruling the defendant duly excepted. The plaintiff obtained a verdict for fifteen hundred dollars, on which judgment was entered. Whereupon the defendant applied for a new trial, which was refused.

Powers of the Common Council of San José.

The questions presented necessarily require an examination respecting the powers of the Common Council of the City of San José, under the Act of incorporation of 1859, which was amended in some particulars not important to this case, in 1863. The only powers which the Council had at the time the contract on which the action was brought was executed, are to be found in the Act of 1859. The tenth section of the Act confers upon the officers the power to pass such ordinances

as they may deem expedient for certain specific purposes, and the next section specifies what must be done to render an ordinance valid and of legal force. The twelfth section declares that "the Common Council shall have no power to create any debt upon the credit of the city, nor to make any expenditure for improvements except as provided for in this Act, nor shall any warrant be drawn on the City Treasury, unless there shall be sufficient moneys to meet the same after paying the expenses of the government, and all other demands legally due;" and by the fourteenth section of the Act it is provided as follows: "At each regular meeting of the Council they shall inquire into the condition of the streets, bridges, school houses, fire department, and all property belonging to the city, and if it shall appear that the interests of the city demand an expenditure of more money than there is in the Treasury appropriated for such purpose, or to recover possession of any real estate or property of said city, they shall make a report of the same, to be published in some newspaper in the city, particularly specifying the object or objects for which the expenditure is required, and the amount of money necessary to be raised by tax to meet the same, and immediately thereafter the said Council shall call an election, giving ten days' notice thereof, at which the persons who are legal voters and tax payers of said city may vote for or against a tax to meet the proposed expenditures. The voting shall be by ballot, and a majority vote shall determine if such tax shall be levied or not. The Common Council shall examine and declare the result, and if the vote is in favor of levying the tax, the Common Council shall forthwith order the tax or taxes to be levied and collected, upon the basis of the last assessment, and shall make the proposed expenditure; *provided*, that the special tax thus levied shall for no one year exceed more than one half of one per cent on the valuation of the property, as shown by the last assessment roll, and shall be levied and collected as provided by law for the levy and collection of State and county taxes;

provided, further, that no special tax for any one year shall exceed the amount of three thousand dollars."

Power of a Common Council to bind a city by contract.

Assuming that the resolution by authority of which the contract with the plaintiff was executed by the Mayor and Common Council was, in effect, an ordinance, and that it was passed by a competent majority, it is necessary to go further and ascertain whether even then the Mayor and Council had authority to bind the city by the contract entered into. Respecting corporations generally, the late Chancellor Kent said: "The modern doctrine is to consider corporations as having such powers as are specifically granted by the Act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other." (2 Kent's Com. 298.) He speaks of the rule thus briefly stated as an obvious doctrine, which had been declared by the Supreme Court of the United States, and repeated in the decisions of the State Courts, and then says: "As corporations are the mere creatures of law established for special purposes, and derive all their powers from the Acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode and manner, and subject matter prescribed." The reasons which are the foundation of this doctrine in respect to private corporations, apply *a fortiori* when considering the powers of municipal corporations. In *Argenti v. City of San Francisco*, 16 Cal. 282, the Court say: "A municipal corporation can only act in the cases and in the mode prescribed by its charter," and the same doctrine as to subject matter is inculcated in the case of *City of Oakland v. Carpentier*, 13 Cal. 545.

By the Act to incorporate the City of San José, passed in 1850, the corporate authorities could sue and be sued; might grant, hold and receive property, real and personal, within the city; might lease, sell and dispose of the same for the benefit of the city, and might provide for the regulation and

use of all commons belonging to the city. To all these rights, titles, interests, and possessions, liabilities and obligations, the Mayor and Common Council succeeded, under the Act passed in 1859; and therefore they possessed the capacity to sue in the corporate name for the recovery of such real property as belonged to the corporation at the time the contract in question was executed, for which purpose counsel might be employed, provided the conditions to the exercise of such power existed.

The Common Council, as we have seen, had no power to create a debt upon the credit of the city, unless there was sufficient money on hand to meet the same, after paying the expenses of the Government and all other demands legally due. Money sufficient to meet a debt to be so created, over and above enough to pay the expenses of the city government and all other demands legally due, was a condition precedent to the power of the Council to create a debt which should be binding on the city. It does not appear from the complaint or otherwise that there was money in the City Treasury properly applicable to pay the debt for which it was intended by the contract the city was to become liable. But as an answer obviating the objection founded on the twelfth section of the Act, the plaintiff says: "The contract created no debt against the city at the time it was executed." Literally this may be true, because the contract was executory, and the debt contemplated by it was to accrue and become due at some time in the future. If no debt could accrue and become due the plaintiff under the contract, then it was not possible for him to sustain any injury by its violation. Hence, to maintain the action in this case, it was necessary to assume that if the plaintiff had been permitted to proceed under the contract, the corporation would have recovered at least some of the lots in the actions to be commenced and prosecuted by the plaintiff, and that upon such recovery the defendant herein would have become indebted to the plaintiff. The Common Council had no authority to provide for the creation of a debt to arise in the future, any more than to create a debt directly

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and *in presenti*. The creation of a debt was contemplated and intended by the contract as much as if it had been provided to pay a sum certain at a particular day, depending upon no other contingency than that the plaintiff should render certain services as the consideration therefor.

The Common Council were the agents of the corporation, and their authority was special and their power distinctly circumscribed. The corporation could not become bound by the contract unless it was made by the Mayor and Council in the exercise of the power delegated by the Act of incorporation, and within its limits. In dealing with these officers the plaintiff was bound to know the extent of their power, and to see that the condition, on which alone it could arise and subsist, had existence. (*Blum v. Robertson*, 24 Cal. 140; *Branham v. Mayor, etc., of San José*, 24 Cal. 604; *Brady v. Mayor, etc., of New York*, 2 Bosw. 173; *Swift v. City of Williamsburg*, 24 Barb. 427.) The fact that these officers assumed to make the contract and thus bind the corporation, did not create the presumption that they possessed the power which they attempted to exercise, for no officer can acquire power or jurisdiction by the mere assertion of it. (*McMinn v. Wheland*, 27 Cal. 314; *People v. Cassels*, 5 Hill, 168; *Harrington v. The People*, 6 Barb. 610.)

Upon the trial of the issues joined, the defendant offered to prove that the facts, on which alone the power of the Mayor and Common Council could arise, had no existence, but the Court sustained the objection interposed by the plaintiff, to the effect that the proof offered was irrelevant, and constituted no defense to the action. The demurrer having been overruled, and the defendant put upon a defense upon an issue of fact, we do not see upon what ground the defense proposed to be proved could be rejected. If the Mayor and Council had no authority to enter into the contract, it was not binding on the corporation; and that such officers had no such authority, it was the object of the evidence offered to show.

There are several other points presented by the record which

we shall omit to consider, as unnecessary to a decision of this case.

Judgment reversed.

Mr. Justice RHODES, being disqualified, did not sit in this cause.

ROBERT S. THOMPSON v. MICHAEL LYNCH, ADMINISTRATOR OF THE ESTATE OF JOHN P. HILL, DECEASED, et als.

ACTION TO RESTRAIN A SALE BY AN ADMINISTRATOR.—A sale by an administrator of land once the property of the intestate, but which he is alleged to have sold during his lifetime, will cast such a cloud on the title of the intestate's prior grantee as will enable him to maintain an action to restrain the sale.

ONE NOT IN POSSESSION MAY ENJOIN SALE OF LAND.—The owner of land not in possession, may maintain an action to restrain a sale of the same by his own grantor, which would cast a cloud upon his title.

DENIALS IN AN ANSWER.—An allegation in an answer by an administrator that the defendant "avers on information and belief that no such deed or deeds were ever executed," is a sufficient denial of an averment in the complaint that defendant's intestate executed and delivered the particular deeds referred to.

EVIDENCE TO PROVE SALE OF LAND BY INTESTATE DURING HIS LIFETIME.—Proof that the intestate stated in his lifetime that he did not own any interest in land, that he had sold out, and of his allowing others to deal with the land as their own, is not evidence sufficient to sustain an allegation in a complaint against the administrator that the intestate executed and delivered deeds of the land.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Edward Tompkins, for Appellant.

Elisha Cook, for Respondent.

By the Court, SAWYER, J.

As to the defendant, Lynch, administrator of Hill — the only party who has appealed — this is an action to restrain him from selling, under an order of the Probate Court, the interest

of the intestate, Hill, in the premises described in the complaint, and thereby casting a cloud upon plaintiff's title. It is conceded that Hill formerly owned the land, and that plaintiff has acquired, by conveyances from him and his grantees, five undivided sevenths. The plaintiff also claims that he has acquired the title to the remaining two undivided sevenths through conveyances from Hill to Tracy and Bedell, of one seventh to each, and from them by proper conveyances to himself. The defendant Lynch, administrator, contests the claim to these two sevenths, and insists that they were never conveyed by Hill, and that they still belong to the estate of his intestate and are subject to be sold by him as administrator. The contest is in regard to these two sevenths. If the plaintiff has in fact acquired the title to these two sevenths by conveyances from Hill, a subsequent sale and conveyance by the administrator would give to the grantee an apparent title from the same source, and the conveyance would necessarily cast a cloud upon the plaintiff's title. (*Shattuck v. Carson*, 2 Cal. 588; *Pixley v. Huggins*, 15 Cal. 133.) An action to restrain the sale and prevent a cloud being cast upon plaintiff's title is not one of the new class of actions provided for in section two hundred fifty-four of the Practice Act, which authorizes a party in possession of real estate to institute an action "against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." And it is not necessary that the plaintiff should be in possession to enable him to maintain an action to restrain the sale. (*Hagar v. Shindler, ante*, 47.)

The plaintiff substantially states his title to have been derived from Hill, and a link in his chain of title to one of the sevenths in dispute, is a conveyance from Hill to Tracy, and to the other, a conveyance from Hill to Bedell. There is a question made as to the sufficiency of the denials in the answer to put the fact as to these conveyances in issue. There are some general loose allegations in the complaint as to title, and the denials are equally loose. In fact, these gene-

ral allegations of the complaint lack precision, and are in such a form as to make it difficult to take issue on the several parts, and perhaps the denials cited in the respondent's brief are as specific and distinct as the allegations reasonably admit of. There is, certainly, much less ground for holding the denials to be insufficient than in the case of *Landers v. Bolton*, 26 Cal. 393, referred to by counsel. But, however this may be, the more specific allegations relate to the conveyances of the two particular sevenths mentioned, and the contest is admitted in the record to relate to these alone; and with reference to these conveyances there is a clause of the answer which is not referred to by respondent. It is, "And on information and belief he avers that no such deed or deeds (deeds 'to said Tracy and Bedell, or either of them') were ever executed." This we think puts the existence of those conveyances in issue.

No deed from Hill to Tracy was produced, and no direct evidence of any kind introduced to show that there ever was any conveyance of any sort relating to the land actually executed by Hill to Tracy. The only evidence on the subject is that Hill, some ten years before the trial of the suit, said that he had sold six sevenths to Tracy and others without saying who the others were, or how much to Tracy, and that he subsequently "swore that he did not own a foot in the Asylum property or in the Hill property; that he had sold out;" that Staples, Tracy, Flint, Dorland and Bedell afterward dealt with the property as their own, and made deeds of partition with the knowledge and, perhaps, in the presence of Hill, and without any participation therein, or objection on his part. This testimony was admitted, under objection, on the grounds that it was not the best evidence of a conveyance, and that it was irrelevant and incompetent. The plaintiff alleged a conveyance from Hill to Tracy, as the mode by which he acquired his title, and it devolved upon him to prove the particular title averred. This evidence alone is certainly not sufficient to establish the fact. Had there been some direct proof that a conveyance of the land had been in fact executed and lost, but the fact not clearly established, the evidence of the subsequent

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acts and declarations of the grantor harmonizing with the hypothesis that a deed had in fact been given, would be admissible, perhaps, as tending to support the other evidence, and as against a stale claim, might be entitled to some consideration. But it would be dangerous to rely upon such declarations alone resting in the memory of witnesses many years after the party making the declarations and performing the acts is dead, and, therefore, unable himself to protect his estate. This is not secondary evidence even. No conveyance was attempted to be directly proved. The Court was simply asked to infer that there had been a conveyance from Hill and Tracy from the general declaration that he had sold out his interest, and from the fact that other parties assumed to own the land without any apparent objection on his part. Hill died in 1855, soon after the alleged acts and declarations. We do not think the Court was authorized to find a conveyance from Hill to Tracy upon this testimony, and without such finding several of the findings necessary to sustain the judgment are not justified by the evidence.

We feel compelled, therefore, to grant a new trial. The defendant, Lynch, administrator of Hill, is the only party who has appealed; as to him, only, the judgment is reversed and a new trial ordered.

H. LEFFINGWELL v. FREDERICK GRIFFING.

ORDER NOT APPEALABLE.—An appeal does not lie from an order directing a statement on motion for new trial to be settled.

STATEMENT ON APPEAL FROM AN ORDER.—If, on appeal from an order made after judgment, the statement contains facts outside the record and affidavit, it should specify the grounds upon which appellant will rely.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The plaintiff recovered a money judgment in the Court below, and defendant filed a statement on motion for a new trial. Notice was given for a settlement of the statement on

a day named, but before the time defendant paid the judgment, and plaintiff's attorney entered a satisfaction. Neither party appeared at the time named for a settlement of the statement. Defendant's attorney afterwards gave notice for a settlement of the statement, and both parties appearing, plaintiff's attorney objected to a settlement on the ground that the motion had been abandoned. The Court overruled the objection.

The other facts are stated in the opinion of the Court.

Grey & Brandon, for Appellant.

Brooks & Whitney, for Respondent.

By the Court, SHAFER, J.

This appeal is from an order overruling plaintiff's objections to defendant's motion for settlement of a statement on motion for new trial, and ordering said statement to be settled.

The order is not appealable. It was made in the course of proceedings taken with a view to a new trial, and is no more the subject of appeal than the order made in the course of the same proceedings fixing the 13th of February, 1865, as the day for settling the statement.

Further, there is no specification of grounds in the statement accompanying the appeal. The appeal is not based alone upon the affidavit contained in the record, but upon the affidavit aided by a statement of facts *aliunde*, and is within the principle of *Haggin v. Clark*, 28 Cal. 162

The appeal is dismissed.

Statement of Facts.

DONAT CURIAC v. ALBERT PACKARD AND LEWIS T. BURTON.

DISCHARGE OF SURETIES ON BOND TO SHERIFF.—If the principals in a bond given to a Sheriff to release goods from attachment, tender to the plaintiff in the attachment suit the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged from their obligation on the bond; and for the purpose of discharging the sureties, it is not necessary that such tender be paid into Court, or kept good.

UNDERTAKING TO PROCURE RELEASE OF ATTACHMENT.—An undertaking given to a Sheriff to procure a release of goods attached, is for the benefit of the plaintiff, who may sue on it, and if the Sheriff takes a sufficient statutory undertaking, he has no further responsibility.

FORM OF UNDERTAKING TO DISCHARGE GOODS ATTACHED.—A common law bond, in form, upon the prescribed statutory conditions, given to a Sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute.

ADMISSION OF INCOMPETENT TESTIMONY WITHOUT OBJECTION.—If testimony not competent in law to prove a fact is admitted without objection, and the testimony is treated by the parties as competent in the Court below, the question as to its competency cannot be raised in the appellate Court.

APPEAL from the District Court, First Judicial District, Santa Barbara County.

The following is the bond given to the Sheriff on which suit was brought:

“Know all men by these presents, that we, Domingo Abadie & Brothers as principals, and Albert Packard and Lewis T. Burton as sureties, are held and firmly bound unto Thomas Dennis, Sheriff of the County of Santa Barbara, in the sum of twenty-five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be paid to the said Sheriff or his assigns, for which payment, well and truly to be paid, we bind ourselves, our heirs and assigns, jointly and severally by these presents, sealed with our seals, and dated this 15th day of December, 1862.

“The condition of the above obligation is such that, whereas the above named Sheriff has by virtue of a writ of attachment, issued under the seal of the above named Court, levied upon the stock of goods now in the Washington Store, in the City of Santa Barbara; now, therefore, if the said plaintiff

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recover judgment as against the said defendants in the above entitled action, that the said judgment will be well and truly paid to the extent of said sum of twenty-five hundred dollars, including costs."

The other facts are stated in the opinion of the Court.

S. F. & J. Reynolds, for Appellant, argued that the bond was a simple bond of indemnity to the Sheriff; that the plaintiff in the action had no interest in it, and that a tender to him did not discharge the sureties. They further contended that even admitting a tender to the plaintiff could discharge the sureties, that the tender was not good because the money was not paid into Court with the plea, and cited *Grah. Prac.* 249; *Petlin v. Shelton*, 1 Strange, 638; and 1 Tidd's *Prac.* 640, 643. They further insisted that if the bond was not one of indemnity to the Sheriff, it was a covenant to pay the amount of the judgment, to secure which the property was attached, and cited *Post v. Jackson*, 17 John. 245.

Eugene Lies, for Respondent, argued that the tender once made, released the sureties, inasmuch as they merely undertook that the principal would do the very thing which he did do when he made the tender, and cited *Hayes v. Josephi*, 26 Cal. 535.

By the Court, SAWYER, J.

Plaintiff, Curiac, sued the firm of D. Abadie Frères, December 15th, 1862, and attached their stock of goods. Thereupon Abadie Frères, as principals, with defendants Packard and Burton as sureties, gave to the Sheriff a bond entitled in said cause, in the sum of two thousand five hundred dollars, reciting the attachment by him of said goods, and conditioned that "if the said plaintiff recover judgment as against the said defendants in the above entitled action, that the said judgment will be well and truly paid to the extent of the said sum of two thousand five hundred dollars, including costs." Upon

the execution of the bond, the property attached was released. The next day after giving the said bond, (December 16th) the defendants in that suit, Abadie Frères, tendered to the plaintiff in the suit the sum of two thousand dollars — the principal of the note in suit — in United States legal tender notes, claiming that they should be received at their face; and the full amount of interest and costs accrued in the suit in coin. The plaintiff offered to receive the legal tenders at their market value, and credit the amount on the notes, but refused to receive the sums tendered at the full value expressed on the face of the notes. A paper entitled in the cause admitting the tender as above stated, signed "Charles E. Huse, attorney for plaintiff," was filed in that cause. Defendants never answered, and judgment by default was entered against them, March 18th, 1864, for the amount of the note, interest and costs. The judgment not being paid, the Sheriff assigned the beforementioned bond, executed by defendants, Packard and Burton, as sureties for "Abadie Frères," to plaintiff, Curia, who thereupon commenced this suit. The defendants, in their answer, aver that after the making of the said bond the said principals, "Abadie Frères," tendered to plaintiff the full amount of the sum due in the action against them, which the bond was given to secure, together with interest and costs then accrued, and that thereby the said sureties became and were discharged. Upon the trial the Court found the facts as alleged, held the sureties to be discharged by the tender, and accordingly rendered judgment for defendants. A motion for new trial having been made and denied, the plaintiff appealed from the order.

Appellant insists that the only evidence of the tender is the admission in writing, by plaintiff's attorney, filed in the case of *Curia v. Abadie et al.*, and that the admission thus made in another case by the attorney of record is not evidence of the fact in this case. The Judge, in his finding, says the facts were admitted. The statement does not, however, directly so state. But it appears by the statement that "the defendant offered and read in evidence, without objection, the admission

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of Charles E. Huse, attorney for plaintiff in said action of *Curiao v. Abadie Brothers* * * * as follows:" giving a copy of the admission in writing before referred to. And that "at the trial the plaintiff asked the Court to decide, as a matter of law, 'that the tender of greenbacks made by Abadie Brothers, in *Curiao v. Abadie Brothers*, which was not accepted, nor was the money paid into Court, furnished no defense to Packard and Burton, the defendants in the present action.' That the Court refused so to decide, to which ruling of the Court the plaintiff excepted." No question as to the competency of this evidence to prove the fact of tender appears to have been made at the trial. Nor do we understand this to be the point of the specification of the ground of new trial in the statement. But the question raised was as to whether the facts shown constituted a valid tender. The testimony having been admitted to prove the fact, without objection, and treated as competent, and the fact of the tender having been treated by all parties as proved, it is now too late for the first time to raise the question, even admitting, for the purposes of the argument, the testimony to be incompetent. Had the objection been made at the proper time, other testimony would doubtless have been introduced.

The question, therefore, is, did the tender discharge the sureties? We think it did. The contract of the defendants, both in substance and form, was one of suretyship, to secure the sum due the plaintiff from Abadie Brothers — if anything should be found due — to the amount of twenty-five hundred dollars. The full amount due for principal, interest and costs of suit, was subsequently tendered in lawful money by Abadie Brothers to the plaintiff, and he had an opportunity to receive his money from the principals in the bond. His refusal to accept it was a breach of good faith toward the sureties, and their interests were imperilled by the wrongful acts of the plaintiff. The averments of plaintiff's complaint show, that, in point of fact, the principals have become "utterly bankrupt," so that, in all probability, if plaintiff should recover in this action, the loss would fall upon the sureties — and this in

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consequence of the act of the plaintiff. Such liability to loss is the reason given for the rule that sureties are discharged by any act of bad faith in relation to their contract on the part of their obligees.

"The contract of suretyship becomes extinct or discharged by a lawful tender made by the principal or his authorized agent to the creditor or his authorized agent." (Bouvier's Law Dictionary, title, "Suretyship.") But we have recently fully discussed the rights of sureties in the case of *Hayes v. Josephi*, 26 Cal. 535. We there said: "So when the means of satisfying the debt subsequently comes into the hands of the creditor, and he does not avail himself of such means, but parts with them without the knowledge or consent of the surety, the surety is discharged. (*Baker v. Briggs*, 8 Pick. 129; *Hays v. Ward*, 4 John. Ch. 129; 8 Serg. and R. 457; Serg. and R. 157.) Under these authorities, certainly a tender by the principal debtor, and a refusal by the creditor to accept the money, would discharge the surety." We see no reason to doubt the soundness of these views. Defendants were sureties for the debt for which the tender was made, and the question is not, what might be its effect upon the question of costs between the parties to the suit—but whether there was such a tender as made it the duty of the plaintiff to receive the money and exonerate the sureties.

We think the new trial was properly denied, even though the particular reason assigned may not have been the proper one.

Order denying new trial affirmed.

By the Court, SAWYER, J., on rehearing.

When a rehearing was granted, we had overlooked a clause in section one hundred twenty-three of the Practice Act, as amended in 1860, and were under the impression that sections one hundred thirty-six and one hundred thirty-seven controlled the case.

Section one hundred twenty-three of the Practice Act pro-

vides that the writ of attachment shall be directed to the Sheriff, etc., and requires him to attach and safely keep all the property of the defendant, etc., "*unless the defendant gives him security by the undertaking of at least two sufficient sureties to satisfy such demand, besides costs; or in an amount equal to the value of the property which has been or is about to be attached, in which case to take such undertaking.*" The undertaking, then, if sufficient and answers the requirements of the statute, is to be taken when the property "*has been*" as well as when it "*is about to be attached.*" The undertaking required by the statute is to be taken instead of the property of the defendant, and is for the benefit of the plaintiff, who is the party in interest, and not for the protection of the Sheriff. It is the mode prescribed by the statute for securing the demand pending the action. If the Sheriff takes a sufficient statutory undertaking his duty in the premises is discharged, and he has no further responsibility in the matter. The rest concerns the plaintiff and the sureties on the undertaking. It only remains to be determined whether the instrument in suit fulfils the requirements of the statute. It was evidently intended to be—and we think it substantially is—a compliance with the provisions of section one hundred twenty-three. It is under seal and in the form of a common law bond with a condition. But the statute does not prescribe the form of the instrument. It is to be an undertaking, and an undertaking is an engagement by one of the parties to a contract to the other, and not the mutual engagements of the parties to each other. There is necessarily an engagement by the party on one side only. (Bouv. Law Dic., 611.) It may be under seal in the form of a common law bond, or without seal in any form that substantially expresses the obligation required by the statute. (*Episcopal Church of St. Peter v. Varian*, 28 Barb. 645; *Conklin v. Dutcher*, 5 How. Pr. R. 388; *Town of Guilford v. Cornell*, 4 Abb. 220.) The sureties undertake that the judgment shall be paid, including costs, to the extent of two thousand five hundred dollars. There is no complaint made that this amount is not equal to the value of the prop-

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erty attached. We think the undertaking a substantial compliance with the statute. That being so, it is an obligation in favor of plaintiff in the action, notwithstanding it runs in the name of the Sheriff. The plaintiff is the real party in interest, and he may sue upon it as such. Section one hundred thirty-four provides that "If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section one hundred twenty-three." It was so held in relation to a bond under seal, running in the name of the State of California, given to procure an attachment under section one hundred twenty-two, where there was no such express provision as is contained in section one hundred thirty-four. (*Taaffe v. Rosenthal*, 7 Cal. 515; see, also, *Baker v. Bartol*, 7 Cal. 553.) The tender was made to the plaintiff, the real party in interest, and discharged the sureties. And for the purpose of discharging the sureties it was unnecessary that the tender should be kept good. The judgment rendered on the former hearing was correct.

Order denying a new trial affirmed.

**JAMES L. McDONALD, WILLIAMSON GRAHAM, AND
JOEL STODDARD v. BENJAMIN ASKEW, SR., BEN-
JAMIN ASKEW, JR., AND A. ASKEW.**

INTEREST IN WATER ACQUIRED BY APPROPRIATION.—The interest in water acquired by one who locates on the bank of a stream, and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location and to the flow of the water in its natural course above.

EFFECT OF SALE OF WATER IN A STREAM ON PRIOR RIGHT TO ITS USE.—If one who has appropriated a part of the water of a stream to propel machinery at a point on the same, makes a conveyance of all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale.

SAME.—A person who has built a mill on a stream and appropriated a part of its water to propel machinery, does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above.

Argument for Appellants.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The plaintiffs' grantors, in the beginning of 1850, erected a mill on the banks of Bear River, and appropriated water from the stream to propel its machinery. Afterwards defendants located a mining claim below the mill, and erected a dam to turn the water of the stream on to the bank to work the claim. Plaintiffs complained that the backwater from the dam impeded their waterwheel.

The other facts are stated in the opinion of the Court.

J. L. Ashford, and *G. N. Swezy*, for Appellants.

The proposition of the Court below that the sale to the Bear River Company rendered the prior rights of the plaintiffs to their flouring mill and appendages, or mill site, subservient and subsequent to the rights of the defendants, we think wrong. We say the plaintiffs had a mill and mill site, both older in location than any rights of the defendants. Now, we claim that whether that mill was run by steam, horse, water, or wind power, that the defendants, who came there after that mill was erected, had no right to flood that mill, or back water up so as to interfere with the running or the use and enjoyment of the same by the plaintiffs. This they would not have a right to do, even if the defendants abandoned the use of the mill as a mill, and converted it into a residence. It is the plaintiffs' superstructure, and being located there prior to any rights of the defendants, the defendants have no right to flood the same, nor any part thereof; it matters not to what use the plaintiffs may put it.

Again, let us suppose that the plaintiffs in digging a well near said mill should strike a constant running stream sufficient to run said mill, and that the same could be turned on to the waterwheel with less expense than damming the river and turning the water as now used; or suppose that some

Argument for Appellants.

ditch company should bring along by plaintiffs' mill a pure, clear stream of water, and offer them a supply to run their mill at a sum greatly less than the expense of keeping in repair the dam, race, and flume, now used in turning the present water upon said wheel; or suppose the plaintiffs should conceive it to be of less expense, and more certain to obtain a constant supply, to bring the waters of another stream to their mill for the propelling of the same; and that in all of these cases, without changing the said mill, waterwheel, or tail-race, the plaintiff should abandon his water privileges and substitute the waters so obtained in the stead thereof, could it be contended in such cases, or in any one of them, that the defendants would have a right to flood said mill, waterwheel, or tail-race, with their dam, or otherwise, on account thereof, interfere with the use or enjoyment by plaintiffs of their said property?

The Court finds that the plaintiffs had the right to one thousand inches of the waters of Bear River. The complaint avers, and such averment is not put in issue, that the plaintiffs had a "water privilege of said Bear River for the propulsion and running of said mill." The Court does not say where on said Bear River that the one thousand inches of water right was situated. If it is the same referred to in the complaint, then of course it is connected with the mill, and must be located near the mill. If a water right independent of the mill, then it has no right to figure here, and it matters not to whom the plaintiffs have sold it, or what the plaintiffs have done with it. If it is the water right referred to in the complaint, and used in the propelling of the mill, it was simply a right to use, for the purposes of their mill, the water of Bear River, as known and understood to be Bear River, at the point of said mill. It was to the waters at that point the plaintiffs' right existed. And we claim that in case the plaintiffs sold or relinquished all their rights to the waters ten miles above that point, it is not a sale or relinquishment of all their rights to the use of the waters of Bear River at the point of their mill; and the rights of the plaintiffs would not thereby become sub-

Argument for Respondents.

ject or subsequent to the defendants, even if the law is as laid down by the Court below.

W. C. Belcher, and J. O. Goodwin, for Respondents.

Pending the litigation plaintiffs sold that right, and it does not matter whether the sale was to A. or B. The sale was the material fact, and that is found. Moreover, having simply a right of use at their mill, they sold the body of the water to be taken out of the river several miles above their mill and carried away, and thus deprived the defendants as well as themselves of its use. By this sale plaintiffs parted with all the right they had acquired by their prior location, and whatever rights they now have to use the waters of the river for milling or other purposes have been acquired subsequent to the sale, and are subject to defendants' right of use for working their mines. This was the conclusion of the District Court, and we think its judgment in the case should be affirmed.

But counsel urge very earnestly that plaintiffs have a mill site and a valuable mill which they ought at least to have the privilege of running by steam or water brought in from some source other than Bear River, and that defendants ought not to be permitted to interfere with the use and enjoyment of their mill site, or mill, even if they have sold away the water that furnished the motive power, and deprived defendants as well as themselves of its use. The plain answer to all that is, that it nowhere appears in this case, nor is it a fact that the defendants have in any way interfered with plaintiffs' mill site or mill, except so far as it is charged they had impeded the convenient use of their waterwheel. The waterwheel is useless without water to move it, and may properly be said to be appurtenant to the water right. The water right they sold, and if our proposition be correct, that having sold all the right they had acquired by prior location, and more, all the rights they now have to use the waters of Bear River for milling or other purpose is subsequent and subject to the right of defendants to use the same, they cannot complain.

By the Court, SHAFTER, J.

This is an action to restrain the defendants from erecting a dam across Bear River, whereby, as the complaint alleges, the water of the river will be impeded in its usual current and flowed back upon the wheel of the plaintiffs' flouring mill, thereby preventing the running of said mill, to the irreparable damage of the plaintiffs.

The defendants, by a supplemental answer, filed by leave of the Court, admitted that the plaintiffs at the commencement of the action, were the owners and entitled to the use of the water at their mill to the extent of one thousand inches and no more; but they averred that pending the action and on the 17th of December, 1862, the plaintiffs "conveyed by deed to the Bear River and Auburn Water and Mining Company all the waters of Bear River to the capacity of the water ditches and works of the said company, to wit: the water ditch known as the Bear River and Auburn Water and Mining Company's Ditch, and the water ditch known as the Gold Hill Ditch. That the capacity of the ditch first named, on the day the deed was executed, was more than two thousand inches, and the capacity of the Gold Hill Ditch one thousand inches. That both said ditches take the waters of the said river from the channel thereof at points more than ten miles above the plaintiffs' said mill. That the plaintiffs claimed and owned the said one thousand inches by virtue of a location and appropriation in or about the year 1849 or 1850, and prior to the construction of the dam of the defendants and the location and appropriation of the waters of said river by them for mining purposes, which event took place in 1853. That at all times since the said sale and conveyance of the waters of Bear River on the 17th of December, 1862, the Bear River and Auburn Water and Mining Company have taken out and diverted from the river, at the heads of their said ditches, and more than ten miles above the plaintiffs' said mill, all the waters of the river to the full capacity of the ditches, and at all times and seasons since the said date much more than one thousand inches, the

amount to which plaintiffs were entitled by virtue of their prior appropriation. That the Bear River and Auburn Water and Mining Company, by means of their said ditches, conduct the waters a long distance away from the river and so use and appropriate the same that no part thereof, or if any, very little, and less than one hundred inches of the same, is returned or comes back to the channel of said river at or above the mill of the plaintiffs or the dam of the defendants."

The trial was by the Court, who found that the admitted prior right of the plaintiffs was limited to one thousand inches. That thereafter and prior to the commencement of the action, the defendants located a mining claim below the plaintiffs' mill, and erected a dam across the river for the purpose of raising and running the water upon their mining ground. That pending the litigation, the plaintiffs conveyed to the Bear River and Auburn Water and Mining Company, all their right, title, and interest in and to the waters of Bear River, or sufficient thereof to fill the ditches of the company, and that the ditches are of greater capacity than the amount claimed by the plaintiffs. That during a large portion of the year the Bear River Company use almost the entire volume of the water of the river, but that below their dams and above the plaintiffs' mill, there are some small tributaries coming to Bear River, sufficient to run the mill, even at the low stage of the water, a portion of the time. That at the lowest stage the water of the said tributaries and waste water from the said ditches amounts to seventy-five inches, and that the mill can run one stone upon seventy inches.

The Court considered that the plaintiffs, "by the sale of their water, and all of it, to the Bear River Company, had lost their prior right; and if they then laid a new claim to the use of the surplus water of Bear River, it being later in time, the claim must be subservient to the claim of defendants for their mining purposes; and their claim is to raise their dam to the height of five feet. This claim of defendants is prior in right to any new claim of water made by plaintiffs subsequent to the sale of their original right of use, and this claim

they are entitled to use in any legitimate manner, with all its incidents. It is true, even a legitimate and reasonable use by defendants of their claim may work an injury to the plaintiffs; but whatever rights the plaintiffs now have to the use of the water in the running of their mill must be subject to the now prior rights of defendants." On these views judgment was entered for the defendants, dissolving the temporary injunction and dismissing the suit with costs.

It will be observed that the reasoning proceeds upon the assumption that the rights which the plaintiffs had acquired by reason of their location and appropriation in 1849-50, passed to the Auburn Water and Mining Company by the deed of December 17th, 1862; and if such was the fact, the conclusion at which the Court arrived may, for the purposes of this hearing be taken as correct. But we do not consider that the subject matter of the conveyance was identical with the rights vested in the plaintiffs, and for the protection of which this suit was instituted.

In the first place, the interest of the plaintiffs in the waters of Bear River related to the point where their dam was built and where the mill stood; while the interest conveyed related to a point where the then existing ditches of the grantees tapped the river ten miles above. That which the plaintiffs parted with is not identical, then, with that which they had, in the matter of location or position.

Interest acquired in water by appropriation, or purchase and sale of the same.

But, further, the interest vested in the plaintiffs, and the interest conveyed by them, differ in essential nature. The interest acquired by the plaintiffs through their prior location was not a property in the water as such. (*Eddy v. Simpson*, 3 Cal. 251; *Kidd v. Laird*, 15 Cal. 179,) but a right to the momentum of its fall at the point where the stream was crossed by the dam, and to the flow of the water in its natural course above as subservient to that end. (*Kelly v. Natoma Water Company*, 6 Cal. 108; Ang. W. C. 91, 96.) The sub-

ject matter of the conveyance made by the plaintiffs was not water power, but water as such; or the right to divert water up to the capacity of certain existing ditches to receive it. If the proper data were given, the amount of water which the grantees thus acquired the right to divert might be stated in cubic feet or in gallons. A grant may be of a certain quantity of water; for instance, for as much as would pass through a pipe or floodgate, or a sluiceway of certain dimensions; or it may be of a certain extent of water power, as much and no more, as is required to operate certain machinery. This distinction is as obvious as it is important. (*Miller ex parte*, 3 Hill, 418; *Bardwell v. Ames*, 22 Pick. 333; *Kennedy v. Scovil*, 12 Conn. 317.) In *Mayor, etc. v. Commissioners of Spring Garden*, 7 Barr, 348, it appeared that the Legislature of Pennsylvania granted the privilege of all the water power of the River Schuylkill, and made a subsequent grant to the District of Spring Garden and Northern Liberties of the right to erect works and supply their inhabitants with water from the river; and it was held that the grant and the acts done thereunder were not in derogation of the right under the previous grant of the water power. Said Mr. Chief Justice Gibson: "A grant of a water power is not a grant of the water for anything else than the propulsion of machinery; and it consequently does not exclude the use of it by any one else, in a way which does not injure or decrease the power. A right may doubtless be granted, if a grant were necessary, to intercept running water and confine it in reservoirs for separate use; but the grant of such right would not be the grant of a water power. No two things can be more distinct and dissimilar.

But notwithstanding the interest transferred to the Auburn and Bear River Water and Mining Company by the deed of December 17th, 1862, was not the identical interest held by the grantors; still if it appeared as matter of fact that a full exercise of the right conferred by the deed, would make the water power of the plaintiffs completely valueless, the judgment would have been free from objection; for in such case the element of irreparable damage would have been wanting.

But it appears by the findings that there are tributary streams entering the river between the head of the ditches named in the deed to the Auburn and Bear River Water and Mining Company and the dam of the plaintiffs, ten miles below; and that when the water is at the lowest stage, "there are seventy-five inches of water passing down the stream, being waste water from the ditches above, and the water of Wolf Creek, a tributary of Bear River, coming in below the dams of the mining companies above;" and that the mill "can run one stone upon seventy inches of water." If the plaintiffs' water power stands thus when the season is at the driest, we cannot doubt that in the wet season its efficiency is impaired much less by the exercise of the rights which passed by the deed, and perhaps not at all. The idea that this residue of power is held by the plaintiffs by newly acquired right, dating from the execution of the deed to the water and mining company, and that it is therefore subservient to the elder right of the defendants, is not only opposed to the view already taken — that the right of the plaintiffs, acquired in 1849, was neither transferred specifically by the deed of 1862, nor rendered valueless by a full exercise on the part of the grantees of the rights acquired under it — but proceeds upon a misconception of the nature of the plaintiffs' interest. We have already given our views on the question of its character, and have only to add, that the plaintiffs had a prior right to the use of all the waters in Bear River, from its springs down, in so far as such use might be necessary as a means to accomplish certain results at the dam. The "water power" to which the plaintiffs were entitled at that point was the principal thing owned by them, and its enjoyment was not dependent upon any given section of Bear River, nor upon any given fraction of its waters. The streams entering the river between the plaintiffs' dam and the heads of the ditches referred to in the deed of 1862, and the drainage generally of that intermediate section, stood in the same relation to the plaintiffs' water power at the dam as the drainage above the heads of the ditches. The original right of the plaintiffs to the drainage between the

ditch heads and the dam is obviously unaffected by the deed, and their right to the drainage of the water sheds of Bear River above that point is unaffected by it also, except as it clothes the grantees with the right to dip or pump out or lead away at that point an ascertained or ascertainable amount of water. The prior right of the plaintiffs is now on foot, and the only effect of the conveyance is to subject the right to the hazard of being less beneficial to the plaintiffs throughout the year, or perhaps in the dry season only, than it would have been had the deed not been given. The case stands as it would if the grantees in the deed had tapped the river at the ten mile point and drained it to the capacity of their ditches for a period of five years, without the consent and adversely to the plaintiffs. The right acquired by such adverse possession, however it might be a clog upon the beneficial use of the water below, would in no sense involve the plaintiffs' prior right as such; nor does it follow necessarily that its beneficial enjoyment would be at all impeded. Under the state of facts which we are now considering argumentatively, it is apparent that the defendants herein could not say that the plaintiffs' prior rights, as against them, were at an end, and that whatever rights the plaintiffs might have to the flow of the water were newly acquired and junior to their own. A record presenting the state of facts here suggested would be like the one now before us in every substantial particular.

It seems to be conceded that the plaintiffs are entitled to judgment for the specific relief prayed for in the complaint should the special answer be held to be invalid; but inasmuch as it appears, by admission in the supplemental bill, that the dam, if raised no higher than four feet above the original bed of the stream, would be of no prejudice to the plaintiffs, and inasmuch as the defendants in their answer to the supplemental complaint aver that the dam might be raised to a still greater height without any detriment to the superior rights of the plaintiffs; and inasmuch as the question of fact involved does

Argument for Relator.

not appear to have been passed upon by the Court below, we cannot enter a judgment determining the rights of the parties with proper exactness. On this state of the record we can do no more than reverse the judgment and award a new trial.

And it is so ordered.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
FRANK LIVINGSTON *v.* ROMUALDO PACHECO,
TREASURER OF STATE.

TRANSFER OF MONEY BY TREASURER OF STATE.—The Treasurer of State could not, prior to January 1st, 1865, transfer to the General Fund any money in the fund created by the Act of April 4th, 1864, providing for the sale of lands for the relief of the volunteers of this State enlisted in the service of the United States.

IN WHOSE NAME WRIT OF MANDATE MUST BE APPLIED FOR.—An application for the writ of mandate must be prosecuted in the name of the real party in interest, and if the name of the people is used, and the people have no interest, and the relator alone is interested, the writ will be denied.

WHO AUTHORIZED TO APPEAR FOR THE PEOPLE IN THE SUPREME COURT.—The Attorney-General is the only person authorized to appear for the people in the Supreme Court, and a private person cannot at his election use the name of the people to obtain redress for private wrongs.

THIS was a proceeding commenced in the Supreme Court to procure a writ of mandate.

The other facts are stated in the opinion of the Court.

H. & C. McAllister, for Relator, argued that the people were the real parties in interest, because the special tax levied by the Act is paid by the people, who have thus a direct pecuniary interest in the proper application of the proceeds as well as an interest in the proper discharge of the duties of the Treasurer, and cited *The People v. Bell*, 4 Cal. 179; *The People ex rel. Hepburn v. Whitman*, 6 Cal. 659; *Mulford v. Mayhew*, 26 Cal. 665; *People ex rel. Dorsey v. Smyth, County Auditor*, 28 Cal. 21; *The People ex rel. Central Pacific R. R. Co. v. Board of Supervisors of San Francisco*, 27 Cal. 665; and *The People ex rel. Carpentier v. Loucks, County Clerk*, 28 Cal. 68.

J. G. McCullough, Attorney-General, for Respondent, argued that mandamus was a civil remedy, like any other action, and that under our practice there was no reason why the name of the people should be used, unless they were interested, and in the present case Livingston alone was interested, and cited Practice Act, Secs. 4 and 468; *Tyler v. Houghton*, 25 Cal. 26; *Sawyer v. County Commissioners*, 25 Maine, 291; *Brown v. O'Brien*, 2 Carter, Ind. 431; and *Summers v. Farish*, 10 Cal. 351.

By the Court, RHODES, J.

The relator purchased from the State forty-five bonds, each for the sum of one thousand dollars, issued under the Act entitled "An Act granting bounties to the volunteers of this State enlisted in the service of the United States, for issuing bonds to provide funds for the payment of the same, and to levy a tax to pay such bonds," approved April 4th, 1864. (Stats. 1864, p. 486.) Those purchased by the relator, were all that were sold under the Act, up to the time of the commencement of this action. The bonds were sold at private sale, on the 23d day of December, 1864, for eighty-eight per cent, but interest did not begin to accrue on the bonds previous to the 1st day of January, 1865, because the coupons for the semi-annual interest to fall due at that date, were cut off and cancelled by the Board of Bounty Commissioners, at the time of the sale and delivery of the bonds. On the 31st day of December, 1864, there was the sum of forty-eight thousand forty-seven dollars and seventy cents in the Interest and Redemption Fund provided for in section fifteen of the Act, and on that day, the Treasurer transferred forty thousand dollars from that fund to the General Fund in the State Treasury. The relator now seeks by mandamus to compel the Treasurer to return to the Interest and Redemption Fund the amount transferred by him to the General Fund, and to proceed to the redemption of the bonds according to the directions contained in the Soldiers' Bounty Act.

The answer denies that the people are the real parties in interest; or that the relator has any authority from them or the Attorney-General to use their name in this proceeding; or that they are jointly interested with the relator in the proceeding or the subject matter thereof; and he avers that the transfer of the funds was made by authority of the Soldiers' Bounty Act. The other matters in the answer do not require any notice, as the parties stipulated that the cause be submitted for decision upon the facts alleged in the petition, with the admission that the coupons for the interest to accrue January 1st, 1865, were cut off and cancelled, as has been mentioned, and that no other of the bonds were sold, besides the forty-five bonds sold to the relator.

There can be scarcely a question, that the Treasurer could not lawfully transfer the funds at the time he performed that act. The provision of the Act on that subject, as found in section eighteen, is as follows: "And in case there should at any time be in the fund created by this Act, for the payment of said interest and the redemption of said bonds, any surplus moneys not needed for the payment of said interest or the redemption of any bonds, it shall be the duty of the Treasurer of State to transfer such surplus moneys to the General Fund of this State." In section nine it is provided that the first payment of interest should not be made sooner than the 1st day of January, 1865. It thus appears that the time for the making of the transfer could not arrive previous to that day. It was doubtless expected by the Legislature that interest would accrue on that day upon bonds that might have been previously sold, and in that view no provision was made for a transfer of the funds until after the several times for the payment of interest had passed; and although, according to the facts appearing in this case, no interest could fall due on the 1st day of January, 1865, yet the Act has not permitted the Treasurer, for that reason, to make an earlier transfer of the funds.

A private person cannot use the name of the people to obtain redress for private wrongs.

But, conceding that the transfer was prematurely made, it does not necessarily follow that the relator is entitled to the relief he seeks. The Treasurer, through the Attorney-General, who appears for him, makes the points that the relator is the real party in interest, and that, therefore, the proceedings should have been brought in his name; and that if the people are the proper parties to prosecute the action, the relator has no authority to use their name. Upon an analysis of the pleadings, it is apparent that the relator is the only person who will suffer an injury in consequence of the premature transfer of the funds. If any injury will accrue therefrom to the people, the relator has failed to state any facts showing how it will accrue. On this point the provision of section four of the Practice Act, that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this Act," is applicable; and it is also provided, in section four hundred and sixty-eight, relating to mandamus, that the writ "shall be issued upon affidavit on the application of the party beneficially interested." But, considering the action as brought on behalf of the people as the real party in interest, then the relator is met by the provisions of section two of the Act concerning the office of Attorney-General, that "the Attorney-General shall attend each of the terms of the Supreme Court, and there prosecute or defend, as the case may be, all causes to which the State may be a party," etc. The Attorney-General is the only person to whom authority is given by law to appear for the people in this Court, and he, or such person as he may delegate authority to, to appear in his name, must represent them in each stage of a proceeding in this Court; but in this cause the Attorney-General not only does not represent the people, but he appears against them. A private person has not the right or power to use at his election, the name of the people for the purpose of obtaining redress for private wrongs.

Argument for Respondent.

The objection of the defendant is well taken.
Petition denied.

Mr. Chief Justice SANDERSON expressed no opinion.

CHARLES J. JANSON v. BENJAMIN S. BROOKS.

FORCIBLE ENTRY WILL NOT LIE AGAINST A SHERIFF FOR SERVING WRIT OF RESTITUTION.—An action under the Act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a Sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ.

SHERIFF NOT GUILTY OF FORCIBLE ENTRY IN SERVING WRIT OF RESTITUTION.—A Sheriff is not guilty of a forcible entry, if, acting in good faith, by virtue of a writ of restitution, he removes from the premises a person against whom the writ does not run, and who is not in privity with any one against whom the writ does run.

INCOMPETENT TESTIMONY ADMITTED.—If incompetent testimony is admitted without objection, the Court will treat the testimony as competent on motion for non-suit and on motion for a new trial.

APPEAL from the County Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. W. Winans, for Appellant, argued that if it was conceded that the respondent entered under a writ of restitution issued in a suit to which appellant was not a party, the entry and detainer would be forcible if any force or intimidation were used, and cited *Chiles v. Stephens*, 1 A. K. Marshall, 333; *Howard v. Kennedy's Executors*, 4 Ala., N. S. 696; *Horsefield v. Adams*, 10 Ala., N. S. 16; *Wattson v. Dowling*, 26 Cal. 125; and *Long v. Neville*, ante, 131.

Brooks & Whitney, for Respondent, argued that the action of forcible entry would not lie against one who entered under process, in good faith, and cited *Commonwealth v. Bigelow*, 3 Pick. 31; *State v. Gilbert*, 2 Bay, 355; *Davis v. Lee*, 2 B. Mon 300; and *Scott v. Newsom*, 4 Sneed, 457.

By the Court, SANDERSON, C. J.

This is an action for a forcible entry and detainer, brought before the constitutional amendments of 1862 took effect. The plaintiff was nonsuited in the Justice's Court, and appealed to the County Court, where he was again nonsuited. He now appeals to this Court, and claims that the judgment of the Court below was erroneous.

We do not deem it necessary to discuss the evidence offered by the plaintiff on the direct examination of his witnesses, for the purpose of determining whether it supports or tends to support the allegations of the complaint. It may be conceded that so much of the evidence as was elicited on the direct examination tended to support the complaint, and that in view of that testimony only the nonsuit ought not to have been allowed. But the plaintiff allowed, without objection, the defendant to prove on the cross-examination of his own witnesses a state of facts which in our judgment precludes his right to recover in this form of action. Thus it appears from the testimony of the plaintiff himself (who was not present at the time of the entry) that he received a message from the Sheriff to the effect that he had executed a writ of possession on the premises in favor of defendant Brooks. He also states that upon his return to the premises he was told by the defendant's servants, who were in possession, putting up a fence, that they were acting for Brooks, and that the Sheriff had been there and pointed out the lines.

William Meyer, the plaintiff's gardener, who was present at the time the defendant came to the premises, testified that the defendant there told him that his companion, Silverthorne, was a Sheriff; that he asked for Janson, the plaintiff, and said that he ought to be there, as they had come to take possession of the land in question; that the Sheriff told him about the men who had come there with him and the defendant, and what he had directed them to do, and also told him to tell Janson that the men were there by his (the Sheriff's) orders.

Murray, another of plaintiff's witnesses, stated, on cross-

examination that he did not know Deputy Sheriff Silverthorne, but that some one came there with a writ, but did not remember reading or seeing the writ.

Murphy, another of plaintiff's witnesses, testified that the Deputy Sheriff put the defendant in possession. In short, we think it is very apparent from the whole tenor of the plaintiff's evidence that the entry complained of was actually made by the Deputy Sheriff, Silverthorne, under a writ of possession in favor of the defendant Brooks. Such being the case we think that the other circumstances in evidence tending to show a forcible entry are thereby explained, and the whole case thereby made shown not to be within the true intent and meaning of the Forcible Entry and Detainer Act.

Does forcible entry and detainer lie by a party put out under a process?

Assuming that the plaintiff was put out by an officer under process not running against him or any one with whom he was in privity, the only question upon the case made by him is as to whether he can avail himself of the present remedy.

There seems to be but little authority bearing directly upon this point. It is insisted on the part of the appellant that in such cases forcible entry and detainer is the proper remedy. In support of this proposition *Chiles v. Stephens*, 1 A. K. Marshall, 333; *Stephens v. Chiles*, 1 Id. 334, (the same case); *Howard v. Kennedy*, 4 Ala., N. S. 592, and *Horsefield v. Adams*, 10 Ala., N. S. 1, are cited.

In *Chiles v. Stephens* and *Stephens v. Chiles*, it was held by a majority of the Court only, without any discussion of the question, that an entry upon premises under a writ of *habere facias possessionem*, in the actual possession under an adverse claim of one who was neither party nor privy to the writ, was unauthorized and illegal, and that such person so dispossessed might maintain a warrant of forcible entry and detainer to regain the possession. The Court was composed of three Judges, one of whom dissented and thought that an order of the Court from which the writ was issued was the proper remedy.

The question under consideration was not involved in the case cited from fourth Alabama. The question there was as to the effect of a judgment in ejectment upon persons in possession who are not parties or privies to the judgment, and claim a possession distinct from that involved in the action, and the case of *Chiles v. Stephens* was there cited, merely so far as it bears upon that proposition.

In *Horsefield v. Adams*, the point decided was that if one was unlawfully ejected by means of a writ of restitution in a suit to which he is neither a party nor privy, this furnishes no justification for him to forcibly eject him who is thus invested with the possession. The Court, in conclusion, merely suggests "that the remedy of such a party is by suit against the Sheriff for his entry under the writ, or against the plaintiffs in the writ for directing his eviction, or some other proceeding equivalent to a suit," citing *Chiles v. Stephens* and *Howard v. Holman*, already noticed. The two cases from Alabama therefore fail to sustain the proposition of the appellant, for they did not directly or indirectly involve the question under consideration, and to it the minds of the Court were not directed. Hence, so far as authority is concerned, the appellant is forced to rely solely upon *Chiles v. Stephens*, which case must be read in the light of the Forcible Entry and Detainer Act of that State, which differs materially from ours.

It will be observed that the Court, in *Chiles v. Stephens*, does not say that the entry of the officer under the circumstances there detailed is forcible, but that it is *unauthorized and illegal*, and therefore that Chiles could maintain a warrant for forcible entry and detainer. The foregoing language, and the conclusions drawn therefrom, is sustained by the Forcible Entry and Detainer Act of that State, which contains this clause: "The forcible entry intended by this Act is, and shall be, any entry, with or without multitude of people, *against the will or without the consent* of the person or persons having

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the possession, in fact, of the premises into which such entry shall be made." Under this provision every entry against the will or without the consent of the party in possession is declared to be a forcible entry, regardless of the question of force. We think the case of *Chiles v. Stephens*, in view of the difference between the Forcible Entry and Detainer Act of Kentucky and our own, has no application or force as authority in this State. The conditions are radically different.

This question came directly before the Supreme Court of Tennessee in the case of *Scott v. Newsom*, 4 Sneed, 457, which was an action of forcible entry and detainer by Newsom against Scott. In that case the land in controversy had been sold under a decree of the Court of Chancery, and purchased by Scott, which sale was subsequently confirmed and the legal title to the land vested in Scott by a decree of the Chancellor, and a writ of possession was issued and Scott put in the exclusive possession of the land by the Sheriff who turned out Newsom who was in the actual possession at the time. Newsom was not a party to the decree under which the land was sold, and he brought forcible entry and detainer to recover the possession. The Court said: "It may be conceded that if Newsom were not a party to the suit of *Glenn v. Ventriss' heirs and creditors*" (the suit in which the sale had been made) "his rights or interests in the land, if any he had, would not be affected by the proceedings or decree in the cause. But that is not now the question. The substance of the plea is that the defendant was put in possession by a ministerial officer of the law, under the authority and by the command of a Court of competent jurisdiction; and the question is, does that constitute a forcible entry and detainer within either the letter or spirit of the Act of 1821, or of any subsequent Act? This question needs only to be stated; it admits of no debate. The distinction between an entry under the circumstances before stated and an entry by a party of his own wrong, and by his own mere act, without color of authority of law, is sufficiently obvious to every mind of ordinary intelligence upon a moment's reflection." * * * "The act of turning

the plaintiff out of possession may have been unauthorized, and contrary to law, because of the existence of facts not presented to the Chancellor in the record before him. If this were so, the plaintiff had an ample and summary remedy by petition to the Court, setting forth the facts, and asking to be restored to his possession; or, if he really had a superior title to the land, he might have resorted to an action of ejectment. But if he were a mere intruder on the land, with neither title nor right of possession, he has no just cause of complaint on the ground of being turned out."

The Court then proceeds to remark upon the abuse of the remedy under consideration, in language quite as appropriate in this State as in Tennessee, and we therefore quote it, without, however, desiring to be understood as applying it especially to the present case: "This remedy of forcible entry and detainer is greatly abused and perverted from its legitimate purposes, and has, perhaps, been productive of far more numerous and serious mischiefs than it was designed to prevent. Instead of being regarded as a remedy for the redress of some legal wrong, it would seem in many cases to be viewed rather as a proceeding intended for the special benefit of persons having no legal right. It must be restricted within its proper limits. And we hold that it is wholly inapplicable to a case like the present."

A distinction is attempted to be drawn by counsel for the appellant between the facts of the foregoing case and a case where there has been merely a recovery in ejectment and a writ of possession issued thereon, as in the present case, upon the ground that in the former the officer is acting under the *direct command* of the Court, and in the latter he is not. We are not able to perceive the alleged distinction. In both cases the writs are the same. Both issue by the command of the Court, and the power of the officer is no greater under the one than under the other.

In the case of *The Commonwealth v. Bigelow*, 3 Pick. 31, this question arose but was not expressly decided. Bigelow obtained judgment against one Winslow, and took out his exe-

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cution, which was delivered to an officer to be extended on Winslow's real estate. It was extended on certain real estate in the possession of Winslow, as tenant of one Russell. Thereupon process of forcible entry and detainer was sued out against Bigelow on behalf of Russell. At the argument, Mr. Chief Justice Parker said: "The Court were inclined to doubt whether forcible entry and detainer could be maintained where the entry was under a judgment and execution; and also whether this process could be maintained on behalf of Russell, since it appeared that Winslow, and not Russell, was the person turned out of possession." Thereupon the case was again argued by counsel for the prosecution, and upon the next day the proceedings were quashed upon the ground last suggested by the Chief Justice.

The case of *Buckman v. Whitney et al.*, (decided by the late Supreme Court of this State, at its October term, 1863, but from some cause not reported,) was an action under the Forcible Entry and Detainer Act. The defendants had been put in possession by the Sheriff claiming to act under a writ of assistance. The principal question on the trial was whether the premises in question were embraced in the writ. The point was made that an action under the Forcible Entry and Detainer Act would not lie in such a case. This point was sustained by the Court. Mr. Chief Justice Cope and Mr. Justice Crocker delivered separate opinions, both arriving at the same result. Inasmuch as the case has not been reported, we quote at length: Mr. Chief Justice Cope said: "The complaint charges an unlawful entry and forcible and unlawful detainer, but we are of the opinion that the case made out does not come within the meaning of the statute. The statute provides for the maintenance of the action in three cases: First, where the entry is unlawful; second, where it is forcible; and third, where it is lawful and peaceable, but the detainer is unlawful. Wherever the entry is forcible an action lies, and it lies in the absence of force where the entry is unlawful; but it is obvious that in this respect the language used is not to be taken in its ordinary sense. The term "unlawful"

embraces in its definition whatever is in violation of law; and strictly speaking, a wrongful entry is an unlawful one; but the mere fact that an entry is wrongful does not make it unlawful in the sense of the statute. The statute is penal as well as remedial, and punishment implies criminality in the offense — not only a wrong done, but a wrongful intent in the party doing it. Both are essential; if either is wanting, the offense is not made out; and to justify the punishment of an entry as unlawful, a wrongful intent is necessary to be shown. An entry in good faith, under color of right, is not within the statute; the remedy was not intended for the adjustment of adverse claims, but as a means of redress and punishment in cases of wilful wrong. It was not intended as a substitute for an action of ejectment, as it undoubtedly would be if the statute were construed as applying in all cases where the entry is wrongful. We regard it as applying only in those cases where the entry is *mala fide* as well as wrongful; and beyond this its provisions cannot with any propriety be extended. In the case before us the entry was made under color of process, and whether it was wrongful or not depends upon a question of boundary, which amounts in reality to a question of title. There is no doubt that the parties acted in good faith, and it would be unjust to deprive them of the possession except upon a full investigation of their rights. Such an investigation is impracticable in a proceeding of this character, and we find in the circumstances of the case nothing to justify an appeal to the statute."

Mr. Justice Crocker, after stating the case, said "It is evident from these facts that the plaintiff was not entitled to maintain this action. There is no evidence of any force, or violence, or any threats of personal violence, or any act whatever on the part of the defendants to show either a forcible entry or a forcible or unlawful detainer. This kind of an action was not intended to try such matters as appear to have been involved in the controversy between these parties, and it is a perversion of all the rules of law relating to the subject of forcible entries to attempt to try such issues in this action.

Opinion of Sanderson, C. J., on Rehearing.

If it be true that the writ of assistance did not authorize the Sheriff to put the defendants in possession of the premises in controversy, the plaintiff had a plain, speedy and adequate remedy to correct the error or mistake by applying to the Court from whence the writ issued, which had full power to remedy any wrong which had been committed in the service of its process, or the plaintiff could have resorted to an action to recover the possession. But it is clear that this action of forcible entry was not a proper one in which to remedy the injury complained of."

We think *Scott v. Newsom* and *Buckman v. Whitney* announce the correct doctrine, and we see nothing in the circumstances of this case to take it from the operation of the rule as there declared. There is nothing to show but that the defendant and those with him were acting in good faith under process issued by a Court of competent jurisdiction. It may be that the plaintiff was wrongfully dispossessed under the writ, but if so he has mistaken his remedy.

Judgment affirmed.

By the Court, SANDERSON, C. J., on rehearing.

Our former opinion was delivered upon the theory that the only substantial question involved, was whether forcible entry would lie against a party who had been put in possession by an officer of the law, in good faith, under legal process. After our opinion was filed the appellant presented a petition for a rehearing, in which it was broadly claimed that the point upon which we had disposed of the appeal was not presented by the record notwithstanding it had been most elaborately argued upon both sides. Profoundly impressed by the apparent earnestness of counsel we were induced to grant a rehearing in order that we might have further opportunity to ascertain, if possible, what legal propositions were involved in the case. A rehearing has been had and we are now fully satisfied that we did not at the first hearing misapprehend the true condition of the case. On the contrary we have no doubt but that this

action was brought upon the theory that it afforded a proper remedy and would lie against a party put in possession by an officer under process and acting in good faith if in so doing he turned out a party whom he could not lawfully dispossess by virtue of his writ; and that it was tried and determined upon that theory in the Court below.

Incompetent testimony not objected to.

The fact that the entry complained of was made under the circumstances above indicated was substantially shown by the testimony of the plaintiff himself, and his witnesses, both on the direct and on the cross-examination. At least it was so far shown as to warrant the Court, while passing upon the motion for a nonsuit, in assuming, as the Court unquestionably did, that the entry was made in that manner. It may be conceded that the testimony was incompetent if objected to, but it was not, and the Court was justified in entertaining it for the purpose of determining what should be the judgment upon the motion for a nonsuit. Moreover, for the purposes of the motion for a new trial, so far as the same was grounded upon the sufficiency or insufficiency of the evidence, the Court was also bound to treat the testimony as competent, for, not having been objected to at the time it was admitted, it was then too late to claim that it proved nothing because it was incompetent. (*McCloud v. O'Neill*, 16 Cal. 392; *Curia v. Packard*, ante, 194.) Whether it was sufficient proof or not, however, would be a different question; but the Court below seems to have regarded it as sufficient, and we are not disposed to question the correctness of its conclusion.

But beyond and independent of what has been said, it is apparent to us upon the face of the record that the fact that the entry was by an officer in good faith under color of legal process, was at least tacitly conceded by counsel for the plaintiff on the motion for a nonsuit. It is manifest to us that he did not regard that fact as standing in the way of his remedy. This is apparent from the fact that he made no objection to the testimony when offered, evidently attaching no importance

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to it and willing to concede the fact; and from the further fact that the ruling of the Court to the effect that forcible entry would not lie in such a case is assigned by him in his motion for a new trial as one of the errors upon which he should rely, unaccompanied by any point to the effect that the evidence was not sufficient to warrant the Court in assuming upon the motion for a nonsuit that the entry was of that character. Under such circumstances it would be gross injustice to the respondent to allow the fact that the entry was of the character claimed by him to be now questioned.

We see no reason for not adhering to our former conclusion.
Judgment affirmed.

IN THE MATTER OF THE ESTATE OF PACHECO.

JUDGMENT OF SUPREME COURT THE LAW OF A CASE.—The judgment of the Supreme Court in a case becomes the law of the case in all its stages, unless the conditions on which it was founded are so changed as to render its accomplishment impracticable.

APPOINTMENT OF EXECUTORS.—The judgment of the Supreme Court, setting the right of two persons to be appointed executors of an estate, should be carried into effect by the Probate Court, notwithstanding the death of one of the persons before the Probate Court acts on the matter.

NOTICE OF APPEAL.—A notice appealing from all orders made by a Probate Court in the case on a certain day, is sufficient to cover any appealable order made on that day.

APPEAL from the Probate Court, Santa Clara County.

The notice of appeal stated that an appeal was taken from the order of the Probate Court made September 3d, 1864, denying the petition of Penniman and others for the removal of Emeric, and refusing to appoint Penniman, and from all orders and decisions made by the Court in that behalf on that day.

The other facts are stated in the opinion of the Court, and in 23 Cal. 476.

Thomas A. Brown, for Appellant, argued that the judgment in 23 Cal. 476, was the law of the case, and cited *Phelan*

v. *San Francisco*, 20 Cal. 44; *Leese v. Clark*, 20 Cal. 416; *Davidson v. Dallas*, 15 Cal. 83; and *McMillan v. Richards*, 12 Cal. 468.

Clarke & Carpentier, for Respondent, argued that the death of Rosa Pacheco De Sibrian, daughter of the deceased, so changed the condition of affairs that the judgment of the Supreme Court was not binding, and that Penniman, having no unqualified right to have Emeric removed, but his right depending on Rosa Pacheco's petition, his right had ceased with her death, and cited *In the matter of the Estate of Carr*, 25 Cal. 585.

By the Court, CURREY, J.

The proceedings with which this case stands immediately connected may be found detailed in the case of the same title reported in 23 Cal. 476.

Upon filing in the Probate Court the remittitur of the Supreme Court in the case reported as above, on the 17th of August, 1864, the Probate Court made an order revoking the letters of administration before then granted to Joseph Emeric, and directing him to account, and by the same order appointed H. P. Penniman, administrator of the estate of said Pacheco, deceased, with the will annexed, to whom it was directed that letters of administration be issued. Soon after this, upon the application of Emeric, the Probate Judge made an order requiring Penniman to show cause why the order made on the 17th of August should not be vacated and set aside. Afterwards, on the 3d of September, the Probate Court made an order revoking the order made on the 17th of August. On the same day Penniman again moved the Court, upon the authority of the judgment of the Supreme Court, to revoke the letters of administration before then issued to Emeric, and for an order appointing him, Penniman, administrator of the estate, in accordance with the petition. This application was

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opposed by Emeric, on the ground that Rosa Pacheco De Sibrian was dead, and that Penniman's right to have Emeric removed, if he ever had any, terminated with the death of Rosa Pacheco. The Probate Court made an order denying the application, on the ground that Rosa Pacheco was dead, and that it was impossible for the Court to enter an order in pursuance of the judgment of the Supreme Court. To the decisions made on the 3d of September, the petitioner's counsel excepted, and has appealed from the orders made on that day. The notice of appeal from the order revoking the one made on the 17th of August is quite general in its terms, but we must hold it sufficient under the Act entitled "An Act to regulate appeals in this State," (Laws, 1861, p. 589.)

Law of a case.

The judgment of the Supreme Court to which we have referred was the law of the case, which the Probate Court was in duty bound to follow, unless the death of Rosa Pacheco so changed the conditions on which it was founded as to render its accomplishment impracticable. The Supreme Court in the case in 23 Cal. 481, reversed the orders appealed from, and directed the Court below to enter an order in accordance with the opinion delivered. The Court decided that both Rosa Pacheco and Penniman were entitled to be appointed to administer upon the estate. Notwithstanding the death of Rosa Pacheco, we do not perceive that any tenable objection could be made to carrying the judgment into effect to the extent that it could be done by the appointment of Penniman in accordance with the petition. The parties concerned preferred that Penniman should be intrusted with the administration of the estate rather than Emeric, from whom they were seeking an account; and even after the death of Rosa Pacheco, the surviving petitioners still urged the Probate Court to appoint Penniman administrator. We think the direction of the Supreme Court would have been carried into effect substantially had the order applied for after the remittitur from

the Supreme Court was filed, and which in the first instance was granted, been allowed to stand.

Therefore the order revoking the order made and entered on the 17th of August, 1864, must be and is hereby reversed, and the Court below is directed to restore the last mentioned order, and to require Emeric to account, and surrender the estate to Penniman, administrator thereof. And it is further ordered and adjudged, that the appellant have and recover of and from the respondent the costs of this appeal.

Mr. Justice RHODES, being disqualified, did not sit in this cause.

HENRY S. SOLOMON AND ANDREW DOTT v. THOMAS MAGUIRE.

EXECUTION ON JUDGMENT AFTER LAPSE OF FIVE YEARS.—An execution could not issue on a judgment under the two hundred and fourteenth section of the Practice Act before its repeal in 1861, after the lapse of five years from its entry, unless ordered to issue by the Court, after it had been judicially ascertained and found as a fact that the judgment, or some part thereof, remained unsatisfied and due.

ORDER OF REFERENCE—WHAT IT SUBMITS TO THE REFEREE.—A reference, with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the Clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid on the judgment.

FINDING NECESSARY TO SUPPORT AN ORDER FOR EXECUTION TO ISSUE.—A finding of facts by a referee that an alleged judgment more than five years old was properly entered, and is a good and valid judgment, does not support a judgment reported by him, that the plaintiffs have execution on the judgment.

EFFECT OF ORDER CONFIRMING REPORT OF REFEREE.—Where a referee reported as facts the existence and validity of a judgment more than five years old, and also reported a judgment that execution issue on the same, but stated that he had not passed on the question whether the judgment had been paid by an alleged accord and satisfaction; *Held*, that an order of Court confirming the report of the referee does not authorize the issuance of an execution on the judgment.

PERIOD DURING WHICH EXECUTION IS STAYED.—The period during which an execution has been stayed by an order of Court is not to be excluded from the five years, after the lapse of which an order of Court was necessary to obtain an execution.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Statement of Facts.

On the 26th day of April, 1852, Thomas Maguire, the respondent, filed a confession of judgment in the District Court of the Fourth Judicial District, in favor of Henry S. Solomon and Andrew Dott, appellants, for the sum of nineteen thousand four hundred and fifty-five dollars and twenty-two cents, and William Andrews, James Donahue, George Hubbard, and Thomas Dennis, for various sums each, amounting in the aggregate, with the amount in favor of Solomon & Dott, to some thirty-eight thousand dollars, and on the same day the judgment was duly entered up by the Clerk. On the 4th day of June, 1855, an execution on the judgment was issued for the amount due Solomon & Dott, and on the same day, on motion of Maguire, an order was made by the Judge for the plaintiffs to show cause why the execution should not be set aside and the judgment satisfied, and that until the argument and decision, all proceedings on the execution be stayed. June 16th, 1855, an order was made by the Court, staying all executions on the judgment perpetually, with leave to plaintiffs to move the Court to vacate the order. The judgment roll had been lost at the time of the motions made in 1860, mentioned in the opinion of the Court.

The judgment as originally entered gave to the plaintiffs a lien on the Jenny Lind Theater and Parker House in San Francisco, and respondent Maguire claimed and offered evidence in support of the claim that in July, 1852, he sold said property to the City of San Francisco, and that the plaintiffs agreed to receive and did receive from him sixty-five per cent of the amount of their judgment in scrip of San Francisco, in full accord and satisfaction of the same. The question of accord and satisfaction is not passed on by the Court.

After the report of the referee had been confirmed, and on the 11th day of February, 1863, an execution was issued on the judgment in favor of Solomon & Dott, and on the 23d day of March, 1863, on motion of Maguire, an order was made by the Court setting aside the execution. From this order Solomon & Dott appealed.

The other facts are stated in the opinion of the Court.

J. W. Winans, for Appellant, contended that the determination of the referee that the judgment was regular and should not be vacated, involved as an unavoidable conclusion that plaintiffs were entitled to an execution, inasmuch as the reference was double, and involved the two questions, whether defendant was entitled to have the judgment vacated, and whether plaintiff was entitled to an execution.

He also argued that the order of the District Court, confirming the report of the referee and his judgment, rendered the referee's judgment a judgment of the District Court, and cited Voorhies' Code, Ed. 1864, p. 524; *Catskill Bank v. Sanford*, 4 How. P. 106; *Field v. Paulding*, 1 Hilton N. Y. Com. Pl. 189.

E. B. Carpentier, and *Byrne & Freelon*, argued that under the two hundred and fourteenth section of the Practice Act an execution could issue only upon the establishment of the fact that the judgment, or some part of it, remained unpaid, and that the report of the referee had not found that fact or passed on the question.

By the Court, SANDERSON, C. J.

In view of the conclusion to which we have come upon the question as to whether the District Court in fact ordered the execution, set aside by the order from which this appeal is taken, to be issued, it becomes unnecessary to notice the other questions so ably and elaborately argued by counsel.

The execution, as admitted on all sides, so far as the proceedings had before the Court for the purpose of obtaining it are concerned, could not issue except by virtue of an order of the Court made in pursuance of the two hundred and fourteenth section of the Practice Act, since repealed. Under that section, it was necessary to make it appear to the satisfaction of the Court that some portion of the judgment remained unsatisfied. That was a fact necessary to be judicially ascertained and found before an order allowing an exe-

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cution to go could be regularly entered. We are of the opinion that this fact never was ascertained, and that no order allowing the execution to go was ever made. The facts bearing upon this branch of the case are substantially as follows:

Order of reference.

On the 14th day of December, 1860, the plaintiffs notified the defendant that they would, on the 22d day of the same month, move the Court for an order vacating the orders of the 4th and 16th of June, 1855, staying the execution then out and all further executions or proceedings upon the judgment, and also for an order allowing an execution to be issued, and on the 26th of January, 1861, the Court made the following order:

“In this cause, the plaintiffs having moved for leave to issue execution upon the judgment herein, and the defendant having moved for an order vacating the judgment herein, and the parties appearing by their respective attorneys, it is ordered that this cause be, and the same is hereby, referred to L. Aldrich as sole referee to take proofs concerning the confession of judgment by the defendant herein and the judgment roll in this cause, and whether the same were actually filed in the Clerk's office of this Court, and to report the testimony with a finding of facts to this Court.”

On the 8th day of April, 1861, in pursuance of a stipulation to that effect, the foregoing order was amended “so as to extend the reference to all parties plaintiff and to authorize him (the referee) to render judgment on his finding.”

It is proper to remark here that the ground of the defendant's motion to vacate the judgment was, first, the alleged invalidity of the judgment, and second, an alleged accord and satisfaction by the payment and receipt of certain scrip of the City and County of San Francisco; it being contended on the part of the defendant that said scrip, though of less value than the face of the judgment, was received by the plaintiffs in full

satisfaction, and on the part of the plaintiffs that it was received only in part payment.

Taking the two motions together, the following principal questions were presented for the decision of the Court: First, the existence and validity of the judgment in question; and second, if valid, the amount, if any still due thereon and unpaid, in which latter question, of course, was involved the question of accord and satisfaction.

It is claimed on the part of appellants that all these questions were submitted to the referee and passed upon by him. On the part of the respondent it is claimed that the question as to what amount, if any, was still unpaid, was not submitted to nor passed upon by him.

It must be confessed that the language of the order of reference is not altogether free from ambiguity, and it is quite clear that a pleading equally as defective would be held bad on demurrer. It is clear, however, upon inspection, that the order, as first made, did not embrace the question as to whether the judgment had been fully satisfied, and, if not, how much was still due. Within the language there used only the questions as to the existence and validity of the judgment are embraced. The language is "to take proofs concerning the confession of judgment * * * and the judgment roll, * * * and whether the same were actually filed in the Clerk's office." In view of the fact that the judgment roll, if there ever was one, consisting of the statement in writing authorizing the entry of judgment with the judgment indorsed thereon, (Section 375 of the Practice Act,) was missing from the Clerk's office, and could not be found, the meaning and scope of the order thus far is obvious. It was to ascertain whether the judgment in the Clerk's register, which on its face, purported to be a judgment by confession, made in open Court by some one as the attorney of the defendant, and not by the defendant in person, had really and in fact been confessed in accordance with the provisions of the three hundred and seventy-fifth section of the Practice Act. So far the order is plain; what change, if any, was made by the

amendatory order? The stipulation upon which the order was made is in these words:

"It is stipulated and agreed that the referee, L. Aldrich, make out a judgment on his finding in the matter referred to him in this action, and that the reference extend to all the parties plaintiff herein."

The amendatory order followed the language of the stipulation. Turn the order end for end and it will read thus: "The reference heretofore made is extended to all the parties plaintiff, and the referee is authorized to report a judgment on his finding."

By this language the power of the referee is enlarged and the number of parties plaintiff to the reference is increased, but the subject matter of the reference remains the same, being neither enlarged nor diminished; on the contrary, the language of the stipulation, as to the subject matter is, "in the matter referred to him;" that is to say, the matter specified in the order already made. The additional power given is to report a judgment. To the first order, as appears from the record, the appellants Solomon & Dott were the only parties plaintiff; but to the judgment, concerning which the reference was being ordered, there were five other plaintiffs, and the amendatory order makes them parties also to the reference. And such, in our judgment, was the full effect of that order, which is made further apparent by comparing the title of the action as given in the first order with the titles given in the stipulation and last order. In the first the title is: "*Solomon & Dott, plaintiffs v. Thomas Maguire, defendant*;" while in the last two it is: "*Solomon & Dott, Andrews et al., plaintiffs v. Thomas Maguire, defendant*." Doubtless this last consideration, standing alone, would be entitled to but little weight, but when viewed in connection with what we have previously said it serves, at least in a measure, to fortify our conclusion as to the scope and extent of the order in question.

Our conclusion then, thus far, is that the claim of the appellants to the effect that the whole subject matter embraced in both motions — the motion of the defendant to vacate the judgment, and the motion of the plaintiffs for leave to issue execution — was embraced in the order of reference, cannot be sustained by any fair and reasonable interpretation of the language employed. If such was the intention of the parties they certainly failed to have it incorporated in their stipulation or in the order of the Court.

Report of referee.

We come now to the report of the referee, which consists of eight findings of distinct facts or propositions, followed by a judgment to the effect that the order of the 4th of June, 1855, staying proceedings on the judgment, be set aside and that Solomon & Dott have execution on the judgment for the full amount due them by its terms less five eighths thereof with interest, etc., terminating with a statement in the following words:

“As a part of this report the referee desires to state that he has not passed upon the question of settlement of the judgment,” (thereby meaning, doubtless, the accord and satisfaction alleged by defendant, including of course the question whether there was anything still unpaid,) it being understood by him that this question is not embraced by the motions referred. Thus coming to the same conclusion which we have announced as to the extent and scope of the order of reference.

Without stating what facts were found by the referee, it is sufficient for our purpose to say that he did not find that there had been an accord and satisfaction of the judgment, nor that there was still unpaid any part thereof. All the facts found relate to the existence and validity of the judgment, and are substantially summed up in the eighth and last finding, which is to the effect that the judgment is a good and valid judgment.

Accompanying the report is the testimony upon which it

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was based — consisting of affidavits, depositions, executions and judgment, and docket entries from the Clerk's office.

Nothing can be clearer than that the facts found by the referee do not support the judgment reported by him.

The report of the referee was filed on the 11th of April, 1861. On the same day plaintiffs notified the defendant that on the 13th of the same month they would make a motion in open Court "for a confirmation of the report of the referee filed herein on this day, and for leave to issue execution upon the judgment therein referred to, and also for an order vacating the order of the Court staying execution."

Order of Court on report of referee.

On the 13th the defendant filed certain exceptions to the report. On the 20th the report and exceptions were submitted to the Court for its consideration and taken under advisement. On the 18th of May following the Court made the following order:

"This cause, heretofore submitted to the Court for decision upon the report of the referee heretofore appointed herein, and the judgment reported by him having been duly considered, it is this day ordered that said report and judgment be and the same are hereby confirmed."

No order was made directing the judgment reported by the referee to be entered as the judgment of the Court, nor in fact was it ever so entered. Nor was there any special order in terms vacating the order of the 11th of June, 1855, and allowing execution to go, ever in fact made or entered; nor did the Court ever in any form determine the question left open by the report of the referee, as to whether there was anything still unpaid on the judgment, which must necessarily have been done before an order for an execution could have been regularly made; and all this in the face of the motion of counsel in which these special orders were specifically embraced. The order of confirmation neither took from nor added to the

legal force and effect of the report of the referee; but, on the contrary, it left every question precisely as it stood in the report. *Qui confirmat nihil dat.* What was left undetermined by the referee was left undetermined by the Court. If there was any infirmity in the report, the Court confirmed that infirmity, and thereby perpetuated it. If by the report of the referee any question involved in the two motions — the motion of the defendant to vacate the judgment, and the motion of the plaintiffs for an execution — was reserved for future determination, such portion of the report was as much confirmed by the order of the Court as any other, and such question was as much reserved for future consideration after as before the order of confirmation. For the purpose, then, of ascertaining what was really determined by the Court, we are compelled to return to the report of the referee, upon which our views, in the respect named, have been already intimated.

It will not do to say that the referee decided that there was a balance due on the judgment, and that the plaintiffs were entitled to an execution therefor, merely because he reported a judgment to that effect, because his report shows upon its face that he did not so decide, but, on the contrary, left the question open and reserved for further consideration for the reason that under the construction put upon the order of reference by him, as he himself states, that question was not embraced in the order, in which respect we have already sustained the view taken by him. Had this part of the report been omitted, the question before us would have assumed a very different complexion. Then the judgment of the referee would have stood upon the record unqualified and unexplained, which would have been the ordinary case of a judgment unsupported and unwarranted by the facts found, but binding and valid until reversed on appeal, and the presumption would be that the referee had passed upon the whole matter embraced in his judgment; but here that presumption cannot be indulged, because it is met at the threshold and overcome by the express terms of the report. How can this Court say that a certain matter has passed into judgment when the paper relied on for

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the purpose of establishing that proposition denies it in express terms? To do so would be to allow bald presumptions to overcome admitted facts.

For the purpose of determining what the referee decided we must look at his entire report, and cannot limit our view to detached portions isolated from the residue. Thus viewed the judgment reported by him becomes a conditional judgment, or, in other words, the clause in his report to the effect that he has not passed upon the question as to whether there is anything still unpaid operates as a proviso to the judgment, and his report and judgment might, therefore, be paraphrased thus: "The judgment in question was at and from the time of its rendition a legal and valid judgment, and the order heretofore made staying execution thereon ought to be vacated and the plaintiffs allowed to take their execution, provided the Court shall determine that the city scrip admitted to have been received thereon was not so received in full accord and satisfaction, upon which point I express no opinion."

The result to which the foregoing reasoning brings us is that the execution issued on the 11th of February, 1863, and quashed by the order of the Court from which this appeal is taken, was not issued by virtue of any order of the Court made under the two hundred and fourteenth section of the Practice Act.

Execution on a judgment when there has been an order of the Court staying execution.

It is however, insisted that the right of the plaintiffs to that execution does not depend entirely upon the proceedings, whether valid or invalid, taken under the two hundred and fourteenth section; but that they were entitled to it under the two hundred and ninth section, which provides that a party in whose favor judgment has been rendered may have his execution thereon at any time within five years thereafter. This point is grounded upon the idea that the time during which the order of the 4th of June, 1855, staying execution on the judgment was in force, constitutes no part of the five

years designated as a limit upon the plaintiffs' right to the execution. It is true that if the time during which the order of the 4th of June, 1855, was in force is to be excluded from the computation of the five years stated in the two hundred and ninth section, the execution of the 11th of February, 1863, was issued within the five years there specified.

Admitting, for the sake of the argument, that the time during which execution on the judgment was stayed is not to be computed as a part of the five years specified in the two hundred and ninth section, will counsel claim that even then the plaintiffs could have their execution by simply calling for it at the Clerk's office? On the contrary, would it not be necessary even in such a case to apply to the Court for the execution? Who is to determine whether there has been any valid stay in such a case? Can the Clerk do it, or must it be done in some form by the Court?

But independent of these questions, there is nothing in the Practice Act to the effect that the time during which the plaintiff is stayed from issuing execution shall not constitute a part of the five years to which he is limited by the two hundred and ninth section. The only provision squinting in that direction is found in the Statute of Limitations, section twenty-seven, but that applies by its terms only to an action upon the judgment; and had the plaintiffs sued upon their judgment, it is possible that the point in question would have been available.

But counsel undertake to sustain their position by analogical reasoning (always more or less unsafe and inconclusive) and the known facts upon which the reasoning is based are drawn from the case of *Dewey v. Latson*, 6 Cal. 134. It is sufficient to say that the case of *Dewey v. Latson* is of very doubtful logic. It is true that we followed the rule in that case, in *Englund v. Lewis*, 25 Cal. 352, but we did so solely upon the ground of *stare decisis*; and we are not disposed to extend the doctrine of that case beyond the precise question there determined.

Judgment affirmed.

Mr. Justice RHODES expressed no opinion.

**ALEXIS DUPUY, EDWARD LLOYD, AND WILLIAM
B. AGARD v. WILLIAM SHEAR AND FREDERICK
D. KOHLER.**

MODE OF COMMENCING SUITS.—The mode of commencing suits and acquiring jurisdiction of the parties is controlled by the Practice Act, and not by the practice which prevailed at common law.

TIME WITHIN WHICH SUMMONS MUST BE ISSUED.—Since the amendment of 1860 to the twenty-third section of the Practice Act, the Clerk is not authorized to issue a summons in an action, without an order from the Court, after the expiration of one year from the filing of the complaint. This principle applies as well to causes in which the complaint was filed before, as to those in which the complaint was filed after the amendment took effect.

SUMMONS ORDERED TO BE ISSUED BY THE COURT.—If the Court is authorized to direct a summons to issue after the expiration of the year, the exercise of the power rests in the legal discretion of the Court, and its action will not be set aside on appeal unless it clearly appears that the discretion was not soundly exercised.

ORDER OF COURT STRIKING OUT COMPLAINT.—Where a plaintiff commences an action by filing a complaint and issuing summons, but makes no service on the defendant until nine years have elapsed, an order of the Court, made on defendant's motion, striking out the complaint for want of prosecution, is not such an abuse of discretion as to justify the appellate Court in reversing the order.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellants.

Bennett, Cook & Clarke, for Respondents.

By the Court, SAWYER, J.

The complaint in this case was filed and summons issued thereon on the 26th of July, 1855. A suit was, therefore, commenced on that day within the provisions of the Statute of Limitations, and also within the provisions of section twenty-two of the Practice Act. But no service was had, and, consequently, no jurisdiction of the persons of the defendants was acquired. The action remained in that condition without any further steps having been taken till October 8th, 1864—a

period of more than nine years. On the last named day the plaintiff, on an affidavit stating the filing of the complaint, the issuing of the summons thereon, and that said summons was lost by the Sheriff, procured from the Judge at chambers, on *ex parte* application, an order that another summons issue. The summons thus issued having been served, the defendants moved to set aside said summons as having been improvidently issued, and to strike the complaint from the files of the Court for want of prosecution. The motion was heard on affidavits and counter affidavits, and granted by the Court. The appeal is from the order setting aside the summons and striking the complaint from the files.

Mode of commencing suits.

The Practice Act prescribes the mode of commencing suits, and acquiring jurisdiction of the parties. The proceeding is controlled by its provisions, and not by the rules of practice which prevailed at common law. When this suit was instituted section twenty-two provided, that "a suit shall be commenced by the filing of a complaint with the Clerk of the Court in which the action is brought and the issuing of a summons thereon." Section twenty-three, as it then existed, also provides, that "the Clerk shall indorse on the complaint the day, month and year the same is filed; and at any time after the filing the plaintiff may have a summons issued." The act of filing a complaint and issuing the summons were both performed, and a suit was, therefore, commenced. But no service was made, and no jurisdiction of the defendants acquired.

When summons may issue.

In 1860 section twenty-three was amended so as to read as follows: "And at any time within one year after the filing of the same the plaintiff may have a summons issued." These are the only provisions prescribing the mode of commencing suits and authorizing the issue of a summons. The summons authorized by section twenty-three to be issued, whether one

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or more, issues as a matter of course upon application to the Clerk. The party, upon filing his complaint and paying the costs, has a right to it, and no order by the Court or Judge is required. But the section was amended in 1860, and limited the time within which the summons provided for in that and the preceding section could be issued, to one year after the filing of the complaint. This is an amendment which merely affects the mode of proceeding, and all proceedings thereafter taken must be in accordance with that provision. A summons thereafter to be issued as a matter of absolute right, must issue by virtue of the provisions of the section as amended, because there is no other provision authorizing the issue of any summons. Conceding, then, that under the provisions of sections twenty-two and twenty-three, a party may have more than one summons issued on the same complaint, they must, since the amendment, all be issued within the time prescribed, for if he relies upon the provisions of that section to establish his right, he cannot have more than these provisions authorize. The summons vacated was issued long after the time limited, and, therefore, not in pursuance of its provisions. And the fact that the plaintiff had at the time of filing his complaint availed himself of the provisions of the statute then in force and procured a writ to be issued, does not affect the question. A technical *alias* summons is not known to our law, and in fact, under our system of practice, there is no necessity for one. The summons specifies no return day, and when it has once been issued it may be served and returned at any time without reference to the time of the commencement of the next term of Court. It is served by delivering a copy to the defendant. If more than one summons is authorized by the Practice Act, the second has no necessary connection with, or dependence upon, the first. It is based upon the complaint alone. The *capias ad respondendum* under the common law system was returnable at the next succeeding term of the Court, and a return of the writ was a necessary prerequisite to the issuing of an *alias*. It was also necessary on return of the *capias* that a continuance roll should be made up, and, unless

there was a continuance, there was nothing to connect an *alias* or *pluries* with the *capias* upon which it depended, and the suit failed. Unless the continuity of the proceeding was kept up by a continuance roll from the issuing of the *capias* to the issuing of the *alias* or *pluries* upon which the defendant was arrested, the issue of the *capias* within the time specified in the Statute of Limitations would not save the action, where the arrest was made on an *alias* issued after the statute had run upon the demand in suit. A party might, doubtless, issue as many writs of *capias* as he pleased on the same demand without reference to the return of the prior writ, but in such case the suing out of such writ would be the institution of a new suit, and not be a process in the same suit. But these principles have no relevancy to our system.

When the Court must order summons to issue.

The Clerk, then, was not authorized to issue the summons set aside without an order of the Court. If the Court had any authority to direct a second summons to issue, it must be because by filing the complaint and issuing a summons thereon a suit had been commenced within the meaning of the provisions of the Practice Act, and there was thenceforth a suit pending and within the control of the Court, which the Court by virtue of its general powers over the subject matter was authorized to dispose of, and as incident to this power it was authorized to direct process to issue for the purpose of acquiring jurisdiction of the person. We can perceive no other ground upon which to base the power of the Court to make the order. Conceding this authority to exist, the exercise of the power rests in the sound legal discretion of the Court. The order for the issue of the summons in the first instance was made upon an *ex parte* application, and, doubtless, without much consideration. Afterwards the question was more fully considered upon the motion to vacate the order and set aside the summons, when both parties were heard upon the merits. The Court then came to the

conclusion that the order had been made and the summons issued improvidently, and the summons was thereupon set aside. The Court upon a full hearing exercised its judicial discretion, and we are not prepared to say that it was not soundly exercised. There was a degree of *laches* — a want of diligence in prosecuting the suit instituted, that is contrary to the spirit of our laws, and which ought not to be encouraged, or even tolerated. Upon either view, then, there was no error in setting aside the summons.

Appellants insist that the motion to strike out the complaint before issue joined was premature.

When the Court may strike complaint from the files.

The defendant having been served with a summons was called upon to make some answer to the commands of the writ, and this he properly did by moving to set it aside. Perhaps he was not authorized to claim any further relief without appearing in the action and submitting himself to the jurisdiction of the Court. He did, however, ask that the complaint be stricken out for want of prosecution, and this branch of the motion was also granted. The record does not show that any objection was taken in the Court below to the hearing of this branch of the motion on the ground that the defendant had not appeared, or that it was premature. Had the point been made, doubtless the Court would have required an appearance to be entered in the action, as a condition of being heard on this branch of the motion. We see no good reason why the Court after the commencement of a suit may not dispose of it by striking the complaint from its files when the plaintiff has failed for many years to take any effective measures to procure a service and give the Court jurisdiction of the person of the defendant. Certainly, it was never contemplated that a party may file a complaint and issue a summons, and then wait an indefinite period of time till the witnesses of the other party are dead, or his evidence destroyed, before he takes any effectual steps to procure a service of process. We do

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not think such a case is provided for in sections one hundred forty-eight and one hundred forty-nine of the Practice Act; but the Court, having got possession of the case by the commencement of a suit, must have some power to dispose of it, when the plaintiff declines or neglects to proceed. In this case more than nine years elapsed after the commencement of the suit without any effectual steps having been taken to procure service of the summons issued, and the parties defendant all the time resided in the city where the suit was pending, and were well known. The District Court passed upon the question, as to whether there was anything in the circumstances of the case to justify the delay, and found against the plaintiffs on that point, and we are not satisfied that it was wrong in this respect. Although the defendant had not appeared in the action, no objection appears to have been made to the motion to strike out on that ground. We think, upon the whole, that this portion of the order should also be affirmed.

The order setting aside the summons and striking out the complaint is affirmed.

WILLIAM H. FANJOY v. DANIEL SEALES.

WHO LIABLE FOR INJURY CAUSED BY DEFECTIVE CONSTRUCTION OF BUILDINGS.—

The owner of a building, who has the same erected by a contractor, is liable in cases where an action can be maintained, for injuries sustained by another by reason of its defective construction, after he has accepted of the building from the contractor.

WHEN OWNER OF BUILDING NOT LIABLE FOR ITS DEFECTIVE CONSTRUCTION.—

The owner of a building, who has the same erected by a contractor, and accepts of the same when completed, is not liable for injuries afterwards sustained by one engaged in painting the same, resulting from the fall of the cornice caused by the painter suspending a staging to the cornice.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. P. Treadwell, for Appellant.

The general principle of law applicable to the case is, that the owner and occupant of land, having the entire sole control of it, is liable for injuries occasioned to a person, without any fault on his own part, by suffering his premises to remain out of repair and in a state liable and likely to occasion such injury, as if any part of the premises, as a cornice, be "not fastened into the wall in the usual manner, or not fastened in a safe, proper, or secure manner, in point of fact." Such a case presents a technical nuisance. It is not necessary to allege or prove a *scienter*, or malice, or that the defendant himself originally created the nuisance; it is sufficient to show that, being the owner and having the entire control of the premises, he suffers them to remain in a state in which they are liable and likely to occasion injury to another, and that thereby the injury has occurred. *Sic utere tuo ut alienum non lædas* is the maxim he violates.

The well considered elaborate opinion in *Boswell v. Laird*, 8 Cal. 469, is in point here, and strongly supports the view taken. On page 498, the Court say: "If the injuries complained of had been occasioned after the completion of the dam by the contractors, and its acceptance by Laird & Chambers, there can be no doubt of the liability of the latter. Parties for whom work contracted for is undertaken, must see to it before acceptance that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties the liability of the contractors has ceased, and their own commenced." Here there was no evidence of negligence in building the dam, except that it gave way and broke in an unusual freshet; that was sufficient *prima facie* proof of negligence, as expressly decided in the case next to be cited.

In *The Mayor of New York v. Bailey*, 2 Denio, 433, the

Argument for Respondent.

subject is well considered, and a principle deduced which this Court, in *Boswell v. Laird*, declares to be founded in good sense. There the plaintiff recovered from the City of New York damages sustained by the breaking of the Croton dam, the city having accepted the work from the competent architect and builder after its completion by contract on the land of the city.

The law does not, in any case, I submit, excuse a nuisance because the damages resulting from it are sustained at the time the thing constituting the nuisance is "being used for a purpose for which it was not intended." Whether such use, for which the thing "was not intended," constitutes a want of proper care, and so relieves from a liability that might otherwise attach, is a question, not of law for the Court, but of fact for the jury.

Porter & Holladay, for Respondent.

The case of *Boswell v. Laird* is inapplicable. In that case the only point decided was that where a liability exists, the architects who erect the structure are liable until they have turned it over to the owner, and he has accepted of it.

This case presents a new and curious question—one upon which we have not met with any decisive authorities *pro* or *con*; and if this Court shall conclude to go behind the order granting a new trial, to examine the main question, it must be determined upon original principles of enlightened reason.

In reason there is a distinction between the case of a passer-by on the sidewalk who breaks his leg through the grating, negligently left fronting premises, and the case in hand, where the plaintiff's attention is called to the condition of the premises. In the latter case, the very fact of undertaking the painting or repair of the house, necessarily implies the exercise of the senses and judgment of the party as to the mode of mounting the building, and if injury follows the effort, *the law* imputes that injury to the carelessness or unskilfulness of the sufferer, and he is without recourse. He cannot be heard to

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complain of injuries sustained in a matter to which his own senses and judgment were first invited into exercise. Not so with the passenger along the street who is injured by a falling fragment from a tottering wall, or by defective grating in the sidewalk. In this latter case it is the duty of the owner to keep his property safely, so that strangers shall not be injured thereby. But not so with the case at bar. His attention is first directed to the work upon which he is to be employed. He is then bound to look out for himself, and he has no insurer. In this case, plaintiff was employed to paint. Would it alter the principle had he been employed to repair or take down the cornice itself, which fell in the operation?

By the Court, CURREY, J.

This is an action on the case for damages consequent on injuries received by plaintiff through or by means of alleged negligence on the part of the defendant. The cause was tried before a jury, who rendered a verdict in plaintiff's favor for two thousand and five hundred dollars, on which judgment was entered. A new trial was granted on the defendant's application, and the plaintiff has appealed.

The case discloses that the defendant, the owner of a brick house in San Francisco, eleven feet front and two stories high, employed one Barry by contract to paint it. The plaintiff, a painter by trade, was employed, with others, by Barry, to perform the work of painting the house. These workmen of Barry, for the purpose of enabling themselves to do the work, suspended to the cornice of the house a staging or scaffolding. After the work was done, while in the act of taking down the scaffolding, the plaintiff stood upon the cornice, when the front wall to which it was attached broke away below the cornice. The cornice and a portion of the wall, and the plaintiff with the same, fell to the sidewalk, a distance of about thirty feet, by which his right arm was broken, besides which he suffered other serious bodily injuries, in consequence of which he was confined to his bed for several months and lost

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his arm by necessary amputation. The plaintiff alleged in his complaint that the upper part of the front wall of the house and the cornice thereto attached were defectively and insufficiently constructed, and was on the part of the defendant wrongfully and negligently permitted so to be and remain while the house was being painted and when the plaintiff sustained the injuries mentioned. He also alleged that the fall of the wall and cornice and the injuries received by him were without fault or want of care on his part. The defendant by his answer traversed each and every allegation of the complaint, and for an affirmative defense alleged that he was not a mechanic; that he had the house and cornice constructed by master mechanics without supervision or direction on his part, except that the same were to be constructed in a substantial and workmanlike manner, and that any injury the plaintiff may have received by the fall or otherwise, was not from any fault, knowledge or negligence on the part of the defendant.

It was proved that the accident happened as before stated, and that by the fall the plaintiff was severely injured and was obliged to suffer the amputation of his right arm near the shoulder, and that as a consequence thereof he incurred a liability of three thousand dollars for medical and surgical service, of which he had paid about one hundred dollars.

On the part of the plaintiff the evidence tended to show that the house had been finished by the mechanics who built it, and accepted from them by the defendant about two months before the contract for painting it was made. That the cornice was not fastened to the front wall of the house in the usual manner or in a safe, proper or secure manner, in point of fact. That the fastening of the cornice was so concealed from view that it could not be seen, and that the plaintiff could not have ascertained the want of a proper fastening of the cornice without tearing down the wall. That painters usually go upon the cornice of such a house as the one in question in painting the house, and use the wall and cornice in the same manner as did the plaintiff in this instance, and that there was no want of care on his part and the part of

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those engaged in the work with him in going upon the cornice, necessary to avoid the accident which occurred. That the defendant was about the building while it was being constructed and while Barry and his workmen, including the plaintiff were painting it, and saw how they were using the wall and cornice, and made no objection and gave no notice that the cornice was not of the usual strength of cornices, and that the same could not be used as was customary in such cases.

It was in evidence that the defendant was not a mechanic. On his part testimony was given tending to prove that the mason work of the house was done for him by contract, in writing, which contract was produced in evidence. That the contractors named in the writing, and who did the work, were experienced master masons, and that the defendant did not superintend or direct them in the execution of the work. That while the walls of the house were going up, the cornice, which was made of wood, was put in the wall by a competent carpenter, who was employed by the defendant by the day to perform that and other work, and who made and put up the cornice without any direction from the defendant as to the manner in which the work should be done. Two of the defendant's witnesses testified that cornices are intended for ornamental purposes, and that in their opinions the cornice in question was fastened sufficiently and was of sufficient strength for all practical purposes for which a cornice is intended.

If any one of the grounds assigned by the defendant for a new trial was well taken the order made granting it must be allowed to stand. The defendant specified several grounds as error, on account of which he asked the Court to vacate the verdict and grant a new trial. The first of these was that the Court erred in admitting certain evidence on the question of special damages, which we do not now propose to consider. The second, stated in general terms, was that upon the facts and circumstances set forth in the statement, as proved or admitted on the trial, and concerning which there seems to be no dispute, the verdict should have been for the defendant

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instead of the plaintiff. We shall consider the case upon the second ground of error thus assigned, and on which the motion was granted.

The theory upon which the plaintiff proceeded was that the defendant was liable to him for the injury which he suffered, on the ground that the upper part of the front wall of the house and the cornice and its fastenings were so negligently and defectively constructed as to be insufficient and inadequate for the support of the painter's staging and the additional weight of such person or persons as were thereon while the house was being painted, and that the same were allowed so to be and remain when the accident described befell the plaintiff; and that it mattered not that the building was constructed by master mechanics without any directions from the defendant as to the work, except that it should be well and substantially done, or that he was ignorant, in fact, of the infirm and insufficient condition of the wall and cornice when the accident occurred.

The house was accepted by the defendant from the contractors some time before it was painted, and if at that time or afterward an injury, by reason of its defective construction, happened to any one for which an action might be maintained, the defendant is the person who would be answerable; for being the owner and having the control of the property, the law imposes on him the duty of maintaining it in such a condition as to occasion no injury to others who are without fault. In such case the doctrine of *respondeat superior* can have no application, because the relation of superior and subordinate did not exist when the accident happened. If the house was insufficiently built the defendant was not bound to accept it from those who had contracted to build it in a substantial and workmanlike manner. By accepting it and allowing it to remain in its then condition he assumed to third persons who might become concerned, its sufficiency for the uses and purposes for which it was constructed. (*Boswell v. Laird*, 8 Cal. 498; *The Mayor*

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of *New York v. Bailey*, 2 Denio, 445.) We say for the uses and purposes for which it was constructed. If the cornice had been so insufficiently fastened to the wall when the defendant accepted the house as finished, as to break away from it by its own weight, and in its fall had injured a passer-by on the sidewalk beneath, there would be no doubt in such case of the defendant's liability. But that the case under consideration is one of very different impression is manifestly obvious. Cornices are intended and constructed for ornamental purposes, and not for the use to which the one in question was put by the painters. We are not satisfied that the general custom of painters to use cornices for supporting the stagings and platforms necessary for the prosecution of their work of painting houses imposes on the owners thereof the duty of constructing such cornices sufficiently strong to sustain burdens for which they were not designed.

The Judge who tried the cause in his charge to the jury, told them, very properly we think, that the plaintiff had no right to expect that the cornice and the part of the wall to which it was fastened were sufficiently strong to answer other purposes requiring greater strength than those for which they were designed, and for which they are ordinarily intended. That it did not follow that cornices are constructed for the purpose of suspending thereon stagings or platforms for painters and mechanics to work upon, because they may often be used for such purposes; and also that if the cornice and wall, though defective in construction, were still sufficient for the purposes for which they were designed but were applied by the plaintiff on his own responsibility for purposes requiring greater strength than those for which they were intended, and their fall was in consequence of such application, then no negligence or breach of duty could be imputed to the defendant on account of any such defect in their construction.

There is nothing in the case from which it can be inferred that the defendant was aware that the cornice was not sufficiently strong to endure the weight and strain to which it was subjected by the painters because of any defect in its con-

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struction. If he could be rendered liable at all for the injuries which the plaintiff received, it must be because the law imputes to him a wrong of which he was not intentionally guilty — a wrong of which the law holds him guilty because he owned and had in his possession the building and suffered it to remain in a condition liable and likely to occasion injury to the plaintiff; who, in order to render the defendant liable in damages, it must appear was using the property in a lawful manner for a purpose to which it might properly be applied, and who, in and by the use which he made of it, was without fault on his part.

The learned Judge who granted the application for a new trial was of the opinion that the evidence did not justify the verdict, and on that ground made the order from which the plaintiff appealed. We also are of opinion the verdict was not warranted by the evidence, and therefore hold that the order should be affirmed.

The order granting a new trial is affirmed.

JOHN M. NEVILLE v. SOLANO COUNTY.

LIABILITY OF COUNTY FOR JAIL GUARD.—The liability of a county for the expense of a temporary guard for the County Jail, under the Act of 1851, is to the persons employed by the Sheriff as such guard, and not to the Sheriff.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Swan & Hays, for Appellant, argued that if the plaintiff was a public officer, and acted in that capacity, (as the complaint shows he did,) he was the mere agent of the county, and did not bind himself to pay the guards; and, also, that a known public agent acting in the line of his duty is not personally liable on the contracts made by him on behalf of the government without a special agreement, and cited *Gridley v.*

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Lord Palmerston, 3 Brod. and Bing. 275; *Nicols v. Moody*, 22 Barb. 611; *Holmes v. Brown*, 13 Barb. 599; *Olney v. Wilkes*, 18 Johns. 122; Story on Agency, Secs. 305, 306.)

W. S. Wells, for Respondent, argued that the Sheriff, being authorized to employ the guard, was the party with whom the county was to settle, and cited *Joyce v. Joyce*, 5 Cal. 449, and *Rowley v. Howard*, 23 Cal. 401.

By the Court, SANDERSON, C. J.

This is an action by a Sheriff against his county to recover the expenses of a temporary guard employed by him, for the protection of the County Jail, and the safe keeping of prisoners confined therein, under and by virtue of the provisions of the twenty-ninth section of the Act concerning Sheriffs, of the 29th of April, 1851; which provides that: "The Sheriff, when he shall deem it necessary, may, with the assent in writing of a County Judge, or in a city, of a Mayor thereof, employ a temporary guard for the protection of the County Jail, or for the safe keeping of prisoners, the expenses of which shall be a county charge."

The Sheriff sues in his own right and not as assignee of the several persons so employed by him, and does not allege that he has paid them for their services, but merely alleges that their services were reasonably worth a certain price per day each, naming it, and that he, in his capacity of Sheriff, has become liable to pay them the amount sued for.

The plaintiff obtained judgment and defendant appeals.

We are of the opinion that the action cannot be maintained.

The Sheriff, when acting under the statutory provision in question, is simply the agent of the county, and contracts for and on account of the county. The contract is between the county and the persons who render the service, and the county is liable to them and their assignees only, and not to the Sheriff.

Judgment reversed.

Mr. Justice RHODES expressed no opinion.

LUCIAN SKINNER v. WILLIAM BUCK *et als.*

MORTGAGE MADE BEFORE 1851.—A mortgage executed prior to the passage of the two hundred and sixtieth section of the Practice Act in 1851, was not a conveyance of a conditional estate to become absolute on a breach of condition, as at common law.

FORECLOSURE OF MORTGAGE BEFORE 1851.—If the owner mortgaged his property, and afterwards sold the same to a person other than the mortgagee, and the mortgage was foreclosed and property sold prior to 1851, the purchaser acquired no title if the mortgagor was the only party defendant. The grantee of the mortgagor was a necessary party defendant.

DIVESTING TITLE BY FORECLOSURE OF MORTGAGE.—A Legislative Act, divesting the title of the purchaser of property previously mortgaged by his grantor, by a foreclosure suit in which the mortgagor was alone defendant, would be unconstitutional.

PRACTICE ACT OF 1850 CONCERNING FORECLOSURE.—The three hundred and ninth section of the Practice Act of 1850, allowing a creditor to maintain his action to enforce a mortgage against the mortgagor alone, is to be construed as requiring the owner of the mortgaged property at the time of foreclosure to be made a defendant.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

W. T. Wallace, for Appellant, argued that the law day of the mortgage having passed before Morehead's purchase, the title of Wells had become absolute, and cited *Merrit v. Lambert*, 7 Paige, 348; 2 Cruise's Digest, p. 66, Sec. 8; *Swett v. Horn et al.* 1 N. H. 333; *Brown et al. v. Cram*, Id. 171; Laws of 1850, p. 219, and Laws of 1851, p. 93, Sec. 260. He also contended that Morehead acquired only an equity of redemption which had become barred by the Statute of Limitations, and cited *Grattan v. Wiggins*, 23 Cal. 35, and 16 Ohio, 139.

Clarke & Carpentier, for Appellant, argued that the enforcement of mortgages under the Practice Act of 1850 was a proceeding *in rem* to subject the property to sale in satisfaction, and that the right of redemption in equity remained until barred by the statute, and cited 4 Kent, 136.

S. O. Houghton, for Respondents, argued that Sec. 309 of the Practice Act of 1850 was not intended to cut off the lien of a prior mortgagee by a proceeding to which he was not a party, and that if it had that construction it was unconstitutional, and that Morehead was not affected by the foreclosure in this case, and cited *Goodenow v. Ewer*, 16 Cal. 468, 469.

Wm. Matthews, also for Respondents, contended that at the date of this mortgage it was the settled law that if the mortgagor conveyed the mortgaged property, the purchaser was a necessary party in a foreclosure suit, and cited *Story's Equity Pl.*, Secs. 196 and 197.

By the Court, SHAFER, J.

This is an action of ejectment to recover possession of certain premises situate in the County of Santa Clara. The trial was by the Court, and the findings are to the effect that on the 3d of March, 1850, one Joseph S. Ruckel was seized in fee of the premises described in the complaint, and on that day mortgaged the same to one Wells, which mortgage was recorded four days subsequent to its date. The debt which the mortgage was given to secure fell due May 5th, 1850. On the 20th of July, 1850, Ruckel conveyed to W. G. Morehead the whole of the mortgaged premises except Lot Number Twenty. The deed was recorded on the 26th of the same month. On the 21st of October, 1850, Wells instituted proceedings against Ruckel to foreclose the mortgage, and on the 28th of December, 1850, he obtained the usual decree. The plaintiff became the purchaser at the Sheriff's sale and in due time obtained a Sheriff's deed. The foregoing are the facts of the plaintiff's title.

It is further found that the defendants, on the 7th of October, 1861, acquired by deed of conveyance from Morehead all of the estate and interest which he acquired under the deed of Ruckel to him, July 25th, 1850, and that the defendants were in possession at the commencement of the action.

Judgment was rendered in favor of the plaintiff for a recovery of Lot Number Twenty—that is, for the premises demanded, less the portion conveyed by Ruckel to Morehead, and by him conveyed to the defendants.

The appeal is from the judgment, and plaintiff claims that on the findings he is entitled to judgment for the whole of the land embraced in his complaint.

This claim is put upon the ground that the mortgage, having been made prior to the Act of 1851 (Prac. Act, Sec. 260,) must be regarded as a conveyance of a conditional estate, to become absolute on breach of condition as at common law; and that the equity of redemption outstanding in Morehead was effectually foreclosed in the action against Ruckel, for the reason that the Practice Act of 1850 (Sec. 309,) in force at the time the suit was instituted, expressly provided that in proceedings to enforce a mortgage it should not be necessary to make other incumbrancers parties, but that the creditor might maintain his action “against the mortgagor alone.”

The mortgage of Ruckel to Wells was executed prior to the adoption of the common law (April 30th, 1850;) but the plaintiff insists that it should be treated as a common law mortgage nevertheless, and for the reason that the civil law prior to the date named had been displaced or superseded by the usages of the people. Without going into the question, we shall assume for the purposes of the argument that the plaintiff's views upon that point are correct.

Right of entry of mortgagor on mortgaged premises.

Assuming, then, that Wells had a conditional estate in the land by force of the mortgage deed, at the date of its delivery, and that the estate became absolute at law on breach of condition, we have the exact case upon which the Court passed in *Grattan v. Wiggins*, 23 Cal. 16. Under that decision the mortgagee lost the right of entry, considered as a remedy, and the right of possession vested in Morehead as the successor of Ruckel, the mortgagor, on the passage of the two hundred and sixtieth section of the Practice Act in 1851, and on the

ground "that the section applies to all mortgages, as well as those executed before as after its passage." Mr. Chief Justice Field, in *Dutton v. Warschauer*, 21 Cal. 619, went much further, and held that under the common law, in the sense in which the Legislature adopted it, a mortgagor, as such, could never have a right of entry on the mortgaged premises. The mortgagee in this case never made any conveyance to the plaintiff, and therefore all the rights now vested in him are to be referred to the Sheriff's deed by which the foreclosure proceedings were consummated.

Owner of property should be made a party to foreclosure of a mortgage.

Whether that deed does or does not put the plaintiff in a position to maintain ejectment against the defendants, who hold under Morehead, assignee of Ruckel, the mortgagee, will depend upon whether Morehead is bound by the foreclosure proceedings.

The Constitution provides (Art. I, Sec. 8) that "no person shall be deprived of life, liberty or property, without due process of law;" and if the Act of 1850 contains a provision going, as the plaintiff contends, to the conclusion that Morehead's title was properly divested under proceedings to which he was confessedly a stranger, then the Act is to that extent unconstitutional and void.

But in our judgment the ninth section of the Act of 1850 does not propose to relieve mortgagees from the constitutional necessity of giving all persons whose interests they may seek to compromise by foreclosure decrees a chance to be heard. The section is not to be construed by increments. "The creditor may maintain his action against the mortgagor alone," is a part of the provision. The main and only purpose of the section was to save foreclosure suits from abatement on the ground of non-joinder of incumbrancers whether prior or subsequent. Morehead was not an incumbrancer, but the absolute owner of the mortgaged property in so far as it was covered by his deed from Ruckel. Though not "mortgagor,"

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yet he stood in the mortgagor's shoes. The purpose of the section was that the owner of the mortgaged property, at least, should be made a defendant in foreclosure, and the "mortgagor" is put by way of sample or illustration. Otherwise we are driven to the somewhat startling conclusion that it was the intention of the Legislature, in case the mortgagor should convey the whole of the mortgaged property, not only that the suit to foreclose might be brought against the "mortgagor alone," but that the decree obtained in the action should bind his grantee as implicitly as if his name and interest had been represented upon the record.

Judgment affirmed.

Mr. Justice RHODES being disqualified, did not sit in this cause.

Mr. Justice CURREY expressed no opinion.

THE PEOPLE v. PATRICK HUGHES.

PROOF ON TRIAL FOR ARSON COMMITTED TO DEFRAUD INSURANCE COMPANY.—

In an indictment for arson for burning a building insured against loss by fire by a duly incorporated company, with intent to defraud the company, it is sufficient for the people to prove a corporation *de facto*, and that the agent by whom the insurance was made was an agent *de facto* of the corporation. The compliance of a foreign corporation with the laws of this State need not be proved.

PROOF AS TO *de facto* EXISTENCE OF CORPORATION.—In an indictment for arson committed with intent to defraud an insurance company, the testimony of the agent that he was acting as the agent of the corporation, and effected the insurance and delivered the policy, which was received by the defendant, is sufficient to warrant the jury in finding the *de facto* existence of the corporation, and the existence and delivery of the policy by its *de facto* agent.

PROOF OF VALIDITY OF A POLICY OF INSURANCE IN CRIMINAL CASE.—In a trial for arson committed with intent to defraud an insurance company, it is not necessary for the people to prove that the policy was valid, and that the defendant could maintain an action thereon for loss.

ARREST OF JUDGMENT IN CRIMINAL CASE.—In an indictment for arson committed with intent to defraud an insurance company, a variance between the name of the company as charged in the indictment and as proved on the trial, is no ground for the arrest of the judgment.

Argument for The People.

AFFIDAVITS OF JURORS TO IMPEACH THEIR VERDICT.—The affidavits of jurors cannot be received to impeach their verdict, except when the verdict is arrived at by a resort to the determination of chance.

NEW TRIAL IN CRIMINAL CASE.—A new trial will not be granted in a criminal case because a Sheriff takes charge of the jury where Deputy Sheriff was sworn, nor because the Judge informs the jury, through the Sheriff, that if they do not agree in five minutes they must remain in the jury room over night.

JUDGMENT OF IMPRISONMENT.—A judgment in a criminal case that the defendant be imprisoned four years from the time of his delivery to the Warden of the penitentiary, is not erroneous.

APPEAL from the County Court, San Joaquin County.

On the motion for a new trial, the affidavits of several of the jurors were offered to show that there were two of the jurors who would not have consented to find the defendant guilty if they had not been informed by the Sheriff that the Judge had sent word to them that if they did not agree in five minutes they would have to remain in the jury room all night. When the jury retired to deliberate on their verdict, a Deputy Sheriff was sworn to take charge of them. The Sheriff himself, and not the Deputy, took charge of the jury. The Sheriff, after the jury had been out several hours, informed them that if they did not agree in five minutes they would have to stay out over night. The foreman told him to ask the Judge to wait fifteen minutes. Before the fifteen minutes expired the jury agreed. The defendant was convicted and sentenced to four years imprisonment, dating from the time of his incarceration. Defendant appealed.

The other facts are stated in the opinion of the Court.

Tyler & Cobb, for Appellant, on the question that a valid contract of insurance ought to have been shown, cited *King v. Gallison*, 1 Taunt. 95; 3 Lord Raymond, 1,532; 1 Bos. & Pul. 40; *United States v. Johns*, 1 Wash. C. C. 363.

J. G. McCullough, Attorney-General, for the People, argued that if the policy issued to the defendant was considered by him valid, it was sufficient in a criminal prosecution, though in a civil case a recovery could not be had thereon, and cited *United States v. Amedy*, 11 Wheat. 392, and on the question

of the *de facto* organization of the company, cited *People v. Stearns*, 21 Wend. 409; *Murray's Case*, 5 Leigh, 720; *Reed v. The State*, 15 Ohio, 224.

By the Court, SANDERSON, C. J.

The questions arising under the first, second and third bills of exceptions, and the exceptions to the refusal and giving of instructions to the jury, so far as they are discussed by counsel, are substantially the same, and we shall consider them together.

I. The defendant was indicted for arson in the second degree, under Article 1,917, Wood's Digest, p. 336, committed by burning a certain building belonging to him, which building was at the time insured against loss or damage by fire by a duly incorporated company, known by the name of the Hartford Insurance Company, with intent to defraud said company. At the trial it was shown by the prosecution that the building was insured in the Hartford Fire Insurance Company, upon the request of the defendant, by one Charles Belding, acting as agent of the company at Stockton, in this State, and that said Belding delivered the policy to the defendant, and that the same was accepted by him. But no proof was offered of the due incorporation of the insurance company or of their compliance with the statutes of this State in order to entitle them to transact business here.

The record does not contain the evidence so far as the present branch of it is concerned, but merely bills of exception and the instructions of the Court. As we understand the record, the only question presented by this branch of it is as to whether it was necessary for the prosecution to prove the existence of the insurance company as a corporation by the production of its charter, and showing a compliance on its part with the law of this State, and that the contract of insurance was made by the duly and legally appointed officers or agents of the corporation, or whether it was sufficient to show a corporation *de facto*, and that the agents by whom the con-

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tract of insurance was made were the agents *de facto* of the corporation.

It is true that counsel for the defendant seem to claim in their brief that the recital of facts, in their bills of exception, as proved and not proved, show that even the *de facto* existence of the corporation was not proved, nor the execution of the policy by any *de facto* officers or agents of such corporation. If this were so, there would be an end of the case, for the want of any evidence whatever upon the question of insurance. But we do not so read the bills of exception or the instructions of the Court. Belding testified that he was acting as the agent of the corporation, and effected the insurance and delivered the policy which was received by the defendant, and was still in his possession, or which is the same thing, in the possession of his attorney. Thus much appears from the recitals contained in the bills of exception. From those facts the jury might well find the *de facto* existence of the corporation, and the execution and delivery of the policy of insurance by its *de facto* agents.

Evidence in trial for arson committed to defraud insurance company.

The question then being such as we have already stated, we are satisfied that no error is shown in that branch of the record which is now under consideration. It was not necessary for the prosecution to prove that the Hartford Insurance Company was legally incorporated, or that the policy was valid, and that the defendant could maintain an action thereon for loss or damage. His guilt or innocence of the offense charged in this indictment cannot be made to depend upon any such questions.

In the case of the *United States v. Amedy*, 11 Wheaton, 392, the prisoner was indicted in the Circuit Court of Virginia, under the Act of Congress of the 26th of March, 1804, for destroying a vessel with intent to prejudice the underwriters, and after a verdict of guilty, his counsel moved for a new trial upon grounds similar to those urged here. A corporation called the Boston Insurance Company were the underwriters,

and it was claimed that the due incorporation of the company must be shown, and that the terms of the law under which the company was incorporated must be shown to have been complied with, and that the policy had been executed by the authority of the company in such a manner as to be legally binding on them. The Court instructed the jury "that it was not material whether the company was incorporated or not; and it was not material whether the policy were valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy, but upon the question whether he had wilfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the underwriters." The Judges were divided in opinion upon the motion for a new trial, and the case was certified to the Supreme Court of the United States, where it was held, (Mr. Justice Story delivering the opinion of the Court,) that the instruction of the Court below was in accordance with the law of the case. In the course of his opinion, Mr. Justice Story said: "This is not the case where a suit is brought by the corporation to enforce its rights, where, if the fact of its legal existence is put in controversy upon the issue, the corporation may be called upon to establish its existence. The case of *Henriques and Van Moyses v. The Dutch West India Company*, cited in 2 Lord Raym. 1,535, as decided before Lord King, whatever may be its authority, was of that sort, and therefore carries with it an obvious distinction; nor is this the case of a *quo warranto*, where the Government calls upon the company to establish its legal corporate powers and organization. The case here is of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime. Under such circumstances, we think, nothing more was necessary for the Government to prove than that the company was *de facto* organized and acting as an insurance company and corporation. The very procurement of a policy by the prisoner to be executed by the company

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was of itself *prima facie* evidence for such a purpose. In cases of the murder of officers, it is not necessary to prove that they are officers by producing their commissions. It is sufficient to show that they act *de facto* as such. In cases of piracy, it has been held sufficient to establish the proprietary title to the ship by evidence of actual possession of the party claiming to be owner. These are analogous cases, and furnish strong illustrations of the general principle."

Variance between name as proved and as charged in indictment.

II. It is next claimed that the Court erred in refusing to arrest the judgment upon the motion of the defendant.

The ground of the motion was a variance between the name of the insurance company, as given in the indictment, and as proved on the trial, the former being the Hartford Insurance Company; and the latter the Hartford Fire Insurance Company. It is sufficient to say that, under our practice, this is no ground for the arrest of a judgment. (Crim. Prac. Act, Secs. 289, 442.) But independent of this the two hundred and forty-third section provides that, "When an offense involves the commission, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured shall not be deemed material."

Affidavits of jurors to impeach their verdict.

III. The Court did not err in denying a new trial. So far as the motion was supported by the affidavits of the jurors, it is sufficient to say that they were not admissible. (*Turner v. Tuolumne W. and M. Co.*, 25 Cal. 397; *Boyce v. California Stage Co.*, 25 Cal. 460.) So far as it rested upon the conduct of the Sheriff it is answered by the cases of *The People v. Boggs*, 20 Cal. 432, and *The People v. Symonds*, 22 Cal. 348. The point made against the judgment is answered by the case of *The People v. King*, 28 Cal. 265.

Judgment affirmed.

By the Court, SANDERSON, C. J., on rehearing.

The re-argument has failed to satisfy us that we misapprehended the true facts of the case on the first hearing. In view of the whole record, we are still of the opinion that there was sufficient evidence before the jury to warrant them in finding the *de facto* existence of the Hartford Fire Insurance Company and the execution and delivery of the policy of insurance by its *de facto* agents.

The point, not noticed in our former opinion, that there is a material difference between our statute defining the offense charged in the indictment and the statute of the United States under which the indictment in the case of the *United States v. Amedy*, 11 Wheaton, 392, was found, affecting the amount and character of evidence, is, in our judgment, without merit. The language of the latter statute in the respect named is: "That if any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy, any ship or vessel of which he is the owner in part or in whole, or in anywise direct or procure the same to be done, with intent to prejudice any person or persons that hath underwritten or shall underwrite any policy or policies of insurance thereon," etc.

The language of our statute is as follows: "Every person who shall wilfully burn or cause to be burned any building, ship, vessel, or other water craft, or any goods, wares, merchandise or other chattel, which shall be at the time insured against loss or damage by fire, with intent to injure or defraud such insurer," etc.

The fact of insurance must exist, in order to complete the offense, under both statutes, and no more so under the latter than under the former; and the same evidence which would amount to proof of that fact in the one case would produce the same result in the other. In short, the distinction attempted to be drawn between the two statutes, in the respect under consideration, has no foundation. This is so obvious, upon inspection, that we did not suppose that any reliance was placed

Statement of Facts.

upon the point, and therefore passed it by without notice in our former opinion.

Judgment affirmed.

THE PEOPLE *ex rel.* CHARLES B. POLHEMUS v. WILLIAM LOEWY, CLERK OF THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT.

DISMISSAL OF ACTION AT PLAINTIFF'S REQUEST.—The defendant in his answer to the complaint set up a cross demand, which he insisted was a proper counter claim, and prayed affirmative relief. Afterwards a stipulation, signed by the attorneys of the respective parties, was filed, whereby it was provided that upon the trial of the cause an account might be taken of the matters thus set up; that if a balance should be found in favor of the defendant, judgment in his favor for such balance might be entered; that the stipulation should be regarded as a compromise of the counter claim, and that the counter claim should be deemed stricken from the answer; *Held*, that on this state of the record the Clerk was not required or authorized by section one hundred and forty-eight of the Practice Act, in the absence of any direction from the Court or counsel of the defendant, to enter an order, upon request of plaintiff, dismissing the action.

POWERS OF THE CLERK.—The construction of the pleadings and stipulation, and determination of the rights of the parties with respect to the counter claim under them, required the exercise of judicial functions not conferred upon the Clerk.

THIS was an original proceeding commenced in the Supreme Court, to obtain a writ of mandate commanding the Clerk of the District Court of the Twelfth Judicial District, City and County of San Francisco, to enter a judgment dismissing and discontinuing an action in which Charles B. Polhemus, the relator, was plaintiff, and James P. Treadwell and others, were defendants.

The relator first applied for a mandamus to compel the Judge of the Twelfth District to enter a judgment of dismissal, and the case is reported in 28 Cal. 166.

The relator afterwards requested the Clerk to enter a judgment of dismissal, and filed with him a discontinuance of the action, the form of a judgment, and deposited with him the defendant's costs up to that time. The Clerk refused to enter the judgment, because an answer had been filed setting up a counter claim.

The other facts are stated in the opinion of the Court.

Delos Lake, for Relator, in support of the writ, cited *Campbell v. Consalus*, 25 N. Y. 613; Practice Act, Sec. 148; and *The People ex rel. Polhemus v. Pratt*, 28 Cal. 166.

J. P. Treadwell, *contra*, argued that section one hundred and forty-eight of the Practice Act did not authorize the Clerk to enter a dismissal without direction from the Court, and cited *Watt v. Crawford*, 11 Paige, 470; *Cummins v. Bennett*, 8 Paige, 79; *Bank v. Rose*, 1 Richardson's Eq. Rep. 292; 1 Barb. Ch. Pr. 228.

By the Court, SAWYER, J.

There was something more than a mere ministerial duty to be performed in this case. A counter claim had been set up in the answer. It was not for the Clerk to determine whether a good cause of action was set out or not, or to determine whether the Supreme Court had finally disposed of that question on appeal. These questions are strictly judicial in their nature. The judgment of the Supreme Court contained no direction to the Clerk in relation to the counter claim. A counter claim had been in fact made, and other relief than that discussed in the opinion of the appellate Court demanded. The answer setting it up was still on the files of the Court. No order had been made by the Supreme or District Court striking out the counter claim. There was a stipulation filed, it is true, in which it was provided, among other things, that its provisions were accepted as a compromise of the counter claim set up, and that the counter claim should be deemed stricken from the answer. But it was also substantially provided in the stipulation, that an account of the rents and profits demanded in the counter claim should be taken, and, if there was any balance remaining after satisfying the amount for which the mortgage could be enforced by the relator as

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against the respondent Treadwell, that then a judgment should be entered for the payment of the same to the respondent Treadwell. This was a stipulation, to that extent, for the same judgment which had been demanded by Treadwell in his answer on his counter claim. We do not understand it to be claimed by relator's counsel that, if the case had been actually tried under the stipulation, and a balance found in favor of respondent, judgment for the same giving the affirmative relief stipulated could not have been rendered for respondent in the case on the pleadings and stipulation as they stood. But whether they do or not, Treadwell was still claiming his judgment under the stipulation, and no act was stipulated to be performed by the Clerk in the premises independent of any direction from the Court. It is plain that it was not the province of the Clerk to determine what effect the stipulation filed had upon the pleadings or the rights of the parties. Such determination necessarily involved a construction of the agreement, and required the exercise of functions of a strictly judicial character, and which pertained to the Court alone.

The very elaborate arguments of counsel on this point in this case, and in the former proceeding before this Court taken against the Judge of the Twelfth Judicial District for the accomplishment of the object now sought, show that in their opinion the question is one of no ordinary gravity, and not readily solved. The question as to whether there is such a counter claim as to preclude a dismissal by the plaintiff without the consent of the defendant, was, after solemn argument, actually determined against the relator by the learned Judge of the District Court. The subsequent application to the Clerk to dismiss, was, in fact, an appeal from the judgment of the District Court to its own Clerk. Clearly it was never contemplated that questions of the nature involved in this proceeding should be determined by the Clerk on application to dismiss under section one hundred forty-eight of the Practice Act.

The mandate must be denied. It is so ordered, and further ordered that respondent recover his costs in the proceeding.

Argument for Appellant.

Mr. Justice SHAFER, having been consulted as counsel, did not participate in the decision.

Mr. Justice RHODES expressed no opinion.

A. C. JACKSON v. MORRIS SHAWL.

INTEREST TO BE CHARGED BY PAWNBROKERS.—The Act of 1861, prohibiting pawnbrokers or pledgees from charging more than four per cent per month on loans made on property pledged as security, is not in violation of Section 2 of Article I of the Constitution, which provides that "all laws of a general nature shall have a uniform operation."

ENFORCEMENT OF CONTRACT WITH PAWNBROKER.—Where a pawnbroker loans money upon property pledged, and the borrower contracts to pay him more than four per cent interest per month, he can recover possession of the property by tendering him the principal and four per cent per month interest.

SAME.—Query!—Could the borrower in such case recover the property by making a tender of the principal sum without interest?

CONTRACT GOOD IN PART AND BAD IN PART.—If a contract is bad in part, for being in violation of law, but good in part, and the good part of the contract can be separated from the bad, that which is good can be enforced in law.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The defendant appealed from the judgment.

The other facts are stated in the opinion of the Court.

Porter & Holladay, for Appellant.

On the face of the complaint it is manifest that the plaintiff has not fulfilled his part of the contract. He agreed to pay interest at seven per cent, while he seeks to evade his own engagement by invoking the protection of the statute concerning pawnbrokers.

By the general law of this State to regulate the interest of money, passed March 13th, 1850, "parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract." Thus the law stood down to 1861, when the Act concerning pawnbrokers was passed. This Act does not provide, nor does it anywhere

Argument for Appellant.

appear in the statute, that the contract is void, but only the lender renders himself liable to the forfeiture mentioned, in a separate suit to be brought for that purpose. So that admitting the validity of the Pawnbroker Act, it does not affect the validity of the contract, but leaves that to stand as valid, if the party loaning chooses to take the risk of incurring the penalty — forfeit three times the value of the article pledged — which forfeiture is to be recovered in a civil action brought for that express purpose.

This law is in derogation of the general law on the subject of interest. It applies only to a certain class, and being severely penal in its character, must be construed strictly. We maintain that the contract set out in the complaint is in itself legal and valid; that a pawnbroker who will venture the risk of the penalty, in case a civil action is brought by the pledger for that purpose, can make a contract for a rate of interest exceeding four per cent, which may be enforced in the Courts according to its terms.

The Act in question is in contravention of Section 11 of Article I of the Constitution of this State, which provides that "all laws of a *general nature* shall have a uniform operation." This law purports to regulate the rate of interest. It is in substance a usury law. It is in its nature a general law, and yet by its terms it is limited to a small number of persons. The law of 1850, regulating the rate of interest, is unquestionably a law of a general nature, applying alike to all persons in the State. But suppose in one of its sections it had provided that certain five persons by name should not "contract for any rate of interest whatever," but that as to them the rate of interest should be limited to one per cent, could such invidious discrimination be maintained or enforced against those few? Does it alter the case if the few who are thus onerously excepted are designated by a certain trade or occupation, instead of naming them as individuals? Is the principle changed by putting the invidious discrimination against the excepted few in a statute by itself, instead of putting them in a separate section of the general law?

James C. Cary, for Respondent.

The Act in question is not in contravention of Article I, Section 11 of the Constitution, which declares that all laws of a general nature shall have a uniform operation. This is a general law, and it is uniform in its operation. The word "uniform" does not mean *universal*. The Constitution is violated only when a privilege extended to one is denied to another, on substantially the same facts. The law does not deny to John Doe any privilege which it accords to Richard Roe. It tells John, and Richard, and every one else, "If you desire to pursue a certain business, which, left to itself, may be fraught with oppression to the necessitous, you must submit to certain regulations." It forbids every one doing certain things when surrounded by a certain circle of facts. This is the true definition of constitutional "uniformity," and the present case is within the construction. (*Smith v. Judge of the Twelfth District*, 17 Cal. 554, 555, *et seq.*; *Ex parte Andrews*, 18 Cal. 681, 682, *et seq.*; *Ex parte Newman*, 9 Cal. 528.)

The proposition advanced by the counsel for the appellant, "that the contract, as set out in the complaint, is in itself legal and valid; that a pawnbroker who will venture the risk of the penalty in case a civil action is brought by the pledger for that purpose, can make a contract for a rate of interest exceeding four per cent, which may be enforced in the Courts according to its terms," is as alarming as it is novel. The clause which forbids expressly the pawnbroker the right to make such a contract might have been left out of the law, and still the penal clause would have furnished the Judge a sufficient guide in declaring the contract void, and the plaintiff vested with a right to the immediate possession of his property. (*Sharp v. Teese*, 4 Halst. 352; *Craig v. State of Missouri*, 4 Peters, 410; *Bartle v. Coleman*, Id. 184.)

By the Court, CURREY, J.

This is an action of replevin in the *detinet* for a gold watch, two diamond rings and two diamond pins, the property of the plaintiff, of the value of nine hundred and fifty dollars. On the 21st of August, 1864, the defendant loaned to plaintiff five hundred dollars, in consideration of which the latter promised to pay the former one month thereafter said sum with interest thereon at the rate of seven per cent per month; and to secure the payment of the principal and interest, the plaintiff delivered to the defendant, who was a pawnbroker, the property above mentioned, in pledge. On the 4th of the following September the plaintiff tendered to the defendant five hundred and twenty dollars for the payment of the sum borrowed and the interest thereon for one month at the rate of four per cent per month, and thereupon demanded the property pledged. The defendant refused to comply with the demand. Hence this action.

To the complaint setting forth the facts, the defendant demurred on the grounds: First — Because by the complaint, it appears the plaintiff contracted to pay seven per cent interest per month on the sum borrowed, while the alleged tender was at the rate of only four per cent per month. Second — Because the Act entitled “An Act to define the duties and liabilities of pawnbrokers and pledgees,” passed April 17th, 1861, is in violation of section eleven of Article I of the Constitution, and therefore void. The demurrer was overruled with leave to the defendant to answer, which he declined to do, and in due time judgment by default, and also final judgment was entered against him.

Rate of interest pawnbrokers may charge.

The second and third sections of the Act, to which the defendant refers in his demurrer, are as follows:

“SEC. 2. The rate of interest or percentage which shall be lawfully charged by any pawnbroker or pledgee shall not

exceed four per cent per month in advance on all loans exceeding twenty dollars, which shall include all charges for discount, commissions, storage, brokerage, wasting and all and every charge or charges thereupon; nor shall said interest at any time be compounded.

"SEC. 3. Any pawnbroker or pledgee who shall directly or indirectly charge or receive any interest greater than four per cent per month, or by charging commissions, discount, brokerage, storage, wastage or other charge, or shall attempt to increase said interest, or shall compound said interest, shall forfeit three times the value of the article pledged or to be pledged, to be recovered by the owner or pledger in a civil action, which may be brought by the party aggrieved."

The constitutional objection which is made to this Act of the Legislature has been settled adversely to the views of the defendant by the cases of *Smith v. The Judge of the Twelfth Judicial District*, 17 Cal. 554; *Ex parte Andrews*, 18 Cal. 680; and *French v. Teschemacher*, 24 Cal. 544, and it is only necessary to say we are satisfied with the general doctrine of those cases respecting the clause of the Constitution in question, and therefore hold the objection made to the statute to be invalid.

An unlawful contract will not be enforced.

It is a well settled principle of the common law that no Court of justice will lend its aid to enforce the performance of any contract or agreement which was intended to contravene the provisions of a positive law (*Pratt v. Adams*, 7 Paige, 653;) and it may be stated, as a general rule, that no contract founded on or growing out of an unlawful Act can be enforced, whether it be *malum in se* or *malum prohibitum*. (*Bank of the United States v. Owens*, 2 Peters, 538, 539; *DeGroot v. Van Duzer*, 20 Wend. 390; *Leavitt v. Palmer*, 3 Coms. 19.) The statute referred to and in part quoted, in effect provides that a pawnbroker shall not charge a greater rate of interest on loans exceeding twenty dollars than four per cent a month in advance. The contract between the parties, as it appears by the complaint,

shows that the defendant, who, in the character of a pawnbroker, made the loan to the plaintiff, charged him interest at the rate of seven per cent per month. The charge thus made was in contravention of the provisions of the statute, and to the extent at least of the three per cent in excess of the measure prescribed, the plaintiff's agreement could not be enforced in any mode provided by law. Now, whether the defendant had any legal claim for any sum as interest when the five hundred dollars became due, it is not necessary to decide. The plaintiff's promise was to repay to the defendant the sum borrowed in one month, and also to pay him seven per cent per month on the principal sum for its use. Here the contract between the parties was legal as to the principal sum, but illegal as to the interest. The two things were not inseparable. "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the common law doth divide according to common reason; and having made that void that is against law, lets the rest stand. The general and more liberal principle now is, that when any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand and the rest be held void." (2 Kent's Com. 467, and cases cited; *DeGroot v. Van Duzer*, 20 Wend. 412; *Leavitt v. Palmer*, 3 Coms. 37; 1 Parsons' Cont. 380.)

A penalty for an act is a prohibition of the act.

The defendant's counsel maintains in argument that the contract between the parties was valid and binding to the full extent of its terms, and that the only remedy, if any, which the plaintiff has, because of the violation of the law, is an action to recover the penalty mentioned in the third section of the Act. Parsons, in his work on contracts, says it has been held in England that where a statute provided a penalty for an act, without prohibiting the act in express terms, there the penalty was the only legal consequence of a violation of the law, and a contract which implied or required such violation

Opinion of the Court — Currey, J.

was nevertheless valid. But Lord Holt denied the doctrine, and Sir James Mansfield established a better rule of law, holding that where a statute provides a penalty for an act, this is a prohibition of the act. We apprehend that this has always been the prevailing, if not the uncontradicted rule of law, on this subject in this country. (1 Parsons on Cont. 382, and cases cited, 4th Ed.)

The plaintiff tendered to the defendant all that was due him by the law of the land, and was thereupon entitled to the possession of the property deposited in pledge. We are of the opinion the judgment should be affirmed.

Judgment affirmed.

SHAFTER, J., concurring specially.

I concur in the judgment.

MICHAEL REESE v. ABEL STEARNS.

TREASURY NOTES EQUAL TO GOLD COIN IN LAW.—In contemplation of law, a dollar in United States treasury notes made a legal tender in payment of debts, is equal to and therefore the equivalent of a dollar in gold coin.

CONTRACT TO PAY GOLD OR ITS EQUIVALENT IN NOTES.—A contract to pay money in gold coin of the United States, or the equivalent of such gold coin if paid in legal currency, is a contract to pay the given number of dollars in any kind of lawful money of the United States, and cannot be enforced in any specific kind of money.

IDEM.—The Specific Contract Act does not authorize the entry of an alternative judgment upon such contract, payable in gold coin, or its equivalent in legal tender notes.

APPEAL from the District Court, First Judicial District, Los Angeles County.

The defendant appealed from the judgment, and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

Opinion of the Court — Sawyer, J.

V. E. Howard, and C. V. Howard, for Appellant.

The judgment is erroneous in decreeing gold coin, or its equivalent "in other legal currency," without fixing the amount of the equivalent; the only other legal currency, at the time of the maturity of the mortgage being United States legal tender notes. It is as uncertain as a judgment would be for so much gold coin, or its equivalent in wheat. If the Sheriff proceeds to sell, as he may do under the judgment for legal tender notes, the amount is not ascertained; and the same difficulty arises if the mortgagee comes to redem. It delegates the judicial function to the Sheriff to fix the amount of the judgment in currency, which the law forbids.

Edward J. Pringle, for Respondent, argued that the judgment was within the suggestion of Lane v. Gluckauf, 28 Cal. 288, and that the amount of currency as an equivalent of gold could be fixed at the time of sale.

By the Court, SAWYER, J.

The note and mortgage in question did not specify the "kind of money or currency" in which payment should be made. On the 12th of November, 1862, a contract in writing under seal, extending the time of payment, was made, by which the defendant Stearns, in consideration of one dollar and such extension, agrees "that all payments of principal and interest * * * shall be made in gold coin of the United States of America, of the present standard of weight and fineness, or the equivalent of such gold coin if paid in legal currency." The judgment directs the mortgaged property to be sold "for United States gold coin, or its equivalent at the time of sale, or previous payment or redemption in satisfaction," etc. It is claimed that this portion of the judgment is erroneous; that it leaves the amount uncertain, and devolves upon the Sheriff the power to determine the equivalent of gold at some future time; that if it was competent for the

Court to render judgment payable in gold coin or its equivalent in currency, it was the duty of the Court to determine and adjudge what amount in legal currency is the equivalent in gold coin. This contract was not made with reference to the provisions of the Specific Contract Act, for that Act was not then in existence. Nor does it come within the provisions of that Act; for a contract cannot be said to be "payable in a specific kind of money or currency," when it provides for payment in the alternative, in a specific kind of money, or in something else. In this respect there is a marked difference between the instrument in suit, and that in *Lane v. Gluckauf*, 28 Cal. 288. In that case there was a direct and express promise to pay in gold coin, without any alternative. It is true, there was a further and independent promise to pay an additional sum if the party should not pay in gold coin, but, in our view, this did not vitiate or modify the previous unqualified promise to pay in coin. We regarded the instrument as containing an absolute promise to pay in coin, and not a promise in the alternative. The instrument in *Lamping v. Hyatt*, 27 Cal. 99, contained no promise to pay in coin, but there was a promise if not paid in coin, to pay "such further sum as may be equal to the difference in value, in the San Francisco market, between such gold coin and the paper currency of the United States, that is now, or may hereafter be made legal tender by the laws of the United States or of this State." We held that the instrument did not authorize a judgment for coin, but we did not determine whether the Court could give effect to the clause quoted. The terms of the instruments in the two cases cited are much more specific than in the one under consideration. They furnished, at least, a conventional standard by which—conceding the Court to be competent to enforce the agreement in this respect—the additional damages agreed to be paid, on failure to pay in coin, might be measured. In the instrument now under consideration no such conventional standard is adopted. The language is, "or the equivalent of such gold coin, if paid in legal currency;" which is doubtless the same in legal effect as it would

be if the language were, "or the equivalent of such gold coin if paid in money," or "other lawful money." The currency referred to must be the legal tender notes of the United States or silver coin, for we know of no other "legal currency" to which reference could have been made. In contemplation of law, a dollar in legal tender notes is equal to, and therefore the equivalent of, a dollar in gold coin. In comparing the two kinds of money the law knows no difference in value between them. It recognizes no other standard of equivalents. And, when parties speak in their contracts of an amount of one kind of money being the equivalent of another kind, without referring to any conventional or other known standard by which the equivalents are to be adjusted, we cannot assume that any standard other than the legal one is intended. If otherwise, where are we to look for the standard by which we are to be guided in the comparison? Where are we to find the yardstick by which to measure the comparative values of the two different kinds of currency, which the law says are equal, but which in the commercial world are not equal, and the relative values of which are not the same in any two cities in the country? Shall we seek it in Wall street, Montgomery street, Salt Lake, or Los Angeles? If under any of these peculiar contracts the Courts can enter into a comparison of values between a dollar in gold and a dollar in treasury notes, which in contemplation of law are equal, it must be because it is expressly so agreed, and there should, at least, be some conventional standard of comparison adopted in the agreement. Where none is adopted the standard of equivalents must be that which the law establishes. Tried by this standard, any given number of dollars in legal tender notes is equivalent to the same number of dollars in coin. And we may here remark that there is no recognition of a difference in value between different kinds of money in the Specific Contract Act. It merely authorizes a judgment for the specific kind of money or currency called for by the contract, without any reference to its relative value. With respect to the value

Opinion of Currey, J., concurring specially.

of gold and silver, and treasury notes, it leaves the matter precisely where the Acts of Congress leave it.

Under this view it is, perhaps, not a matter of any practical consequence that the sale is ordered to be made for gold coin or its equivalent. The contract, however, is not made payable in any specific kind of money, but is in the alternative, and the judgment should have simply found so much money due and directed a sale of the premises for the payment of the same, without specifying the kind of money in which payment should be made.

Ordered that the judgment be modified by striking out all those portions of the judgment which require the sale of the property to be made for, or payment to be made in gold coin, or in gold coin or its equivalent.

SANDERSON, C. J., concurring specially.

Had the contract in this case been to pay a certain sum in coin, or a certain other sum in legal tender paper, or had the contract been in terms like that declared on in *Lane v. Gluckauf*, I can see no reason why it would not have come within the Specific Contract Act, so called, and might not have been enforced by an alternative judgment and execution as suggested by me in that case. But I agree that the language of the contract does not have that effect, and the result must be the same as if the contract was entirely silent upon the subject of "coin" and "legal currency," for the reasons stated by Mr. Justice Sawyer, and upon that ground only I concur in the judgment.

CURREY, J., concurring specially.

The defendant's contract was, in effect, to pay the debt due the plaintiff in gold coin of the United States, or its equivalent in legal currency, or United States notes issued under the laws of Congress; which notes were, by those laws, declared lawful money and a legal tender in the payment of certain private

Opinion of Currey, J., concurring specially.

debts. This Court has held in several cases that these notes are lawful money and a legal tender in the payment of private debts. It being so judicially determined, it results as a logical necessity that, in judgment of law, a given number of dollars of one kind of lawful money of the United States of America is the equivalent of the same number of dollars of another kind of lawful money of the same United States. So that when one promises in the alternative to pay another a specified number of dollars of one kind of lawful money or its equivalent of another kind of lawful money, his promise is to pay the sum specified in any kind of lawful money of the United States. I therefore agree with my brethren that the judgment of the District Court should be modified in the particular stated.

Mr. Justice RHODES expressed no opinion.

WILLIAM MEYER, LOUIS WORMSER, AND SIMON WORMSER, v. H. KOHN, AND WILLIAM L. DAUTERMAN.

PARTNERSHIP CONTRACT TO PAY IN GOLD.—One member of a partnership may bind the firm, by a contract in writing signed with the firm name, to pay a debt of the firm in a specific kind of money.

ENFORCEMENT OF PAYMENT IN GOLD FOR GOODS BOUGHT.—A debt for goods purchased by a firm, with a verbal understanding that it is to be paid in gold coin, may be enforced in gold coin, if, after the debt has accrued and suit has been commenced on it, one of the firm makes a contract in writing in the firm name, dated before the sale, to pay in gold, provided the complaint avers a contract to pay in gold made before the goods were sold.

JUDGMENT PAYABLE IN GOLD COIN.—If the complaint aver a contract in writing by defendant to pay for goods sold in gold coin, made before the sale, and such contract is made after suit commenced, but dated before the sale, judgment should be rendered payable in gold coin.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The amended complaint averred a contract made by acend-
ants to pay in gold coin, dated the 30th day of March, 1864.

Opinion of the Court — Shafter, J.

The Court below gave a general judgment for plaintiffs, not payable in any specific kind of money. Plaintiffs appealed from the judgment, and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

P. L. Edwards, for Appellants, argued that the agreement signed by Dauterman to pay in gold, was binding on the firm, and cited 3 *Stephens nisi prius*, 2,409, 2,411, 2,414; *Tapley v. Butterfield*, 1 Met. 515; 2 *Parsons on Contracts*, 359-64; and *Collyer on Part. 546*, and Notes; and that it might be regarded as an admission of both partners that there was an original agreement payable in gold coin, and cited 1 *Parsons on Con.*, 151, 152, 153; and also that the paper was only furnishing evidence by which an honest contract already made could be enforced.

Moore & Alexander, for Respondents, argued that the contract signed by Dauterman on the 7th of June, although dated March 30th, took effect only from the date of its delivery, and that the paper was a mere offer on the part of defendants, which did not amount to a contract, and cited *Chitty on Con.*, p. 8; *Tuttle v. Love*, 7 John. 470; and *McKinley v. Watkins*, 13 Ill. 140.

By the Court, SHAFER, J.

The original complaint in this action was framed upon an alleged indebtedness for five thousand one hundred and forty-one dollars and ninety-eight cents for goods sold and delivered. The complaint was filed on the 6th day of June, 1864. On the 12th of that month an amended complaint was filed charging that the defendants, as partners, promised in writing, on the 30th of March, 1864, that they would pay the plaintiffs in gold coin for any goods which they, the defendants, should buy of them, ensuing said date; and that the defendants did, between the said date and the 1st of June, 1864, purchase of plaintiffs goods to the amount of four thousand and forty-seven dollars. A credit of twenty-one dollars is admitted. The

Opinion of the Court — Shafter, J.

complaint contains another count for one thousand one hundred and twenty-seven dollars and seventy-five cents. The plaintiffs recovered a general judgment for five thousand four hundred and one dollars.

The question is whether the plaintiffs are entitled to a judgment payable in coin for the amount (four thousand and forty-seven dollars) claimed in the special count.

It appears that the goods were bought subsequent to the 30th of March, 1864, and under a verbal understanding that they should be paid for in gold coin. The contract was reduced to writing on the 7th day of June, the day after the commencement of the action; Dauterman signed the paper in the name of the firm, and thereupon delivered it to the plaintiffs. The document was dated March 30th, 1864.

The case stands as it would if the defendants had each signed his own name to the contract; or as it would if Dauterman had signed the name of the firm in the presence and with the express sanction of his partner. The paper was voluntarily given, and it may be added, in pursuance of a moral obligation which the defendants were bound in conscience to fulfil. The complaint states a case within the Act of April 27th, 1863, and the defendants, whose interest it was to defeat a recovery, pending the litigation, furnished the evidence which the Act prescribes, and apparently for the very purpose of enabling the plaintiffs to prove up their case. Having executed the paper under these circumstances, the defendants are not now at liberty to go behind it. To allow them to do so, would be contrary to the maxim that "that to which a person assents is not esteemed in law an injury," and to the maxim that "he is not to be heard who alleges things contradictory to each other."

The plaintiffs are entitled to a general judgment for one thousand one hundred and twenty-seven dollars and seventy-five cents, and a judgment for four thousand and twenty-six dollars, payable in United States gold coin, and the judgment is modified accordingly.

Mr. Justice SAWYER expressed no opinion.

**WILLIAM M. STODDARD v. L. L. TREADWELL AND
GEORGE R. CARTER.**

COSTS WHEN A NEW TRIAL IS AWARDED.—Where a judgment for plaintiff is reversed by the appellate Court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the Court below incurred on the first trial.

COSTS IN ACTION FOR MONEY.—In an action for the recovery of money or damages, the prevailing party is entitled to his costs, and the Court has no discretion in awarding them.

POINTS NOT NOTICED.—Points not made in the Court below, nor embraced in the grounds upon which the appeal was taken, will not be considered by this Court.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This case will be found reported in 26 Cal. 294. On the re-trial, the Court allowed plaintiff his costs in the District Court incurred in the first trial.

The other facts are stated in the opinion of the Court.

P. L. Edwards, for Appellant.

George R. Moore, and *George Cadwalader*, for Respondent.

By the Court, SANDERSON, C. J.

Only a question of costs is involved in this appeal.

Two trials have been had in the case, in both of which the plaintiff was successful. From the first judgment the defendants appealed to this Court and obtained a reversal and a new trial. On the second trial the plaintiff filed a bill of costs in which he included the costs of the first trial. Thereupon the defendant made a motion to retax by striking out all costs claimed for and on account of the first trial, which was denied; and hence this appeal.

We think the ruling of the Court below is sustained by the uniform practice in this State, and by the decisions of this Court for many years, and we should not feel disposed to dis-

Opinion of the Court — Sanderson, C. J.

turb a rule so long established and uniformly observed, even if the weight of argument was opposed to it, which, however, we do not think is the case. The action is for the recovery of money or damages, and, under the four hundred and ninety-fifth and four hundred and ninety-seventh sections of the Practice Act, the prevailing party is entitled to costs as a matter "of course," which means as a matter of right. The question of costs in the cases provided for in those sections does not rest in the discretion of the Court, but they follow the judgment as a matter of course. The question of costs rests in the discretion of the Court only in such cases as are provided for in sections four hundred and ninety-eight and five hundred, and the present case is not embraced by the provisions of either. (*Gray v. Gray*, 11 Cal. 341; *Fisher v. Webster*, 13 Cal. 58; *Ex parte Burrill*, 24 Cal. 350.) If, as claimed by counsel for appellant, this rule is a harsh one, the fault lies with the statute and the remedy with the Legislature.

The point to the effect that the costs of the first trial, as taxed at the second trial, are in excess thereof as taxed at the first trial by a hundred dollars and more, and that therefore the judgment ought to be modified by a reduction of the amount to that extent, cannot be entertained by us, for the reason that no such point was made in the Court below, and for the further reason that it is not embraced in the grounds of the appeal, as set out in the transcript.

Judgment affirmed. -

Mr. Justice RHODES expressed no opinion.

Points decided.

WILLIAM DAVIS v. MARK LIVINGSTON, FRANK LIVINGSTON, W. P. C. STEBBINS, SAMUEL SHELDON, AND JOSEPH GOSLING, DEFENDANTS, AND JAMES BROCKAW AND SAMUEL METCALF, INTERVENORS, AND CHESTER BROWN AND ASA R. WELLS, INTERVENORS.

NOTICE CLAIMING A MECHANICS' LIEN.—The notice of a sub-contractor or material man, given to the employer, claiming a lien under the contract of the contractor for labor done for or materials furnished to the contractor, should contain a statement that the amount for which the lien is claimed is due over and above all payments and offsets.

LIEN OF SUB-CONTRACTOR OR MATERIAL MAN.—The sub-contractor or material man, in order to hold a lien for work done for or materials furnished to the contractor, must comply strictly with the provisions of the Act.

SEVERAL NOTICES CLAIMING SAME LIEN.—If the sub-contractor or material man serves more than one notice claiming a lien for the same account, the several notices cannot be considered together for the purpose of determining the sufficiency of notice to hold a lien, but each must stand on its own merits, and the lien will not exist unless one of the notices is sufficient in itself to give it.

SUFFICIENCY OF NOTICE CLAIMING LIEN.—The notice of a material man claiming a lien for materials furnished the contractor need not state the particular character of the materials furnished, nor that the materials were used in constructing the building, and if there are several contractors, the notice is sufficient if it name one of them.

EFFECT ON LIEN OF APPORTIONMENT OF JOB AMONG CONTRACTORS.—If joint contractors apportion the job and compensation of constructing a building among themselves by a written contract to which the employer is not a party, it is no defense in an action by a material man to enforce a lien for materials furnished one joint contractor, that when notice was given there was nothing due the contractor furnished, under the apportionment.

FOR WHAT AMOUNT A NOTICE GIVES LIEN.—The lien of the material man or laborer can be enforced for all sums to be paid the contractors and not due when the notice is given.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Davis commenced this action in a Justice's Court, to enforce a lien for one hundred and twenty-four dollars and seventy cents. Brokaw & Metcalf intervened, claiming a lien, and Brown & Wells also intervened, claiming a lien. The case was then transferred to the District Court for trial. The three notices claiming a lien, given by Brokaw & Metcalf, were all

Argument for Appellant.

for the same account, and the first was served April 7th, the second April 10th, and the third April 15th, 1863. The following was the second notice, which the Court holds sufficient:

"To Messrs. M. and F. Livingston:

"GENTLEMEN:—You are hereby notified as the employers of Joseph Gosling, contractor for the erection of the two certain houses on Powell street, between Union and Filbert streets, in the City of San Francisco, belonging to you, that we have furnished and supplied the following materials as hereinafter set forth, for the erection, construction, and finishing of the said buildings, to Mr. Joseph Gosling, the contractor aforesaid; that the prices set against the said materials are those, and the total amount of said account is the amount agreed to be paid to us therefor, by the said Gosling, and the said amount, to wit: the sum of one thousand four hundred and sixty-two and seventy-seven one hundredth dollars (\$1,462.77) is still due and unpaid to us by said Gosling over and above all payments and offsets for or against the said materials, etc., so furnished and delivered.

"SAN FRANCISCO, April 10th, 1863.

"BROKAW & METCALF."

The Court below enforced the liens claimed by the several parties; that claimed by Davis for the amount asked by him; that claimed by Brokaw & Metcalf for one thousand five hundred and two dollars and fourteen cents, being the sum stated in their third notice; and that of Brown & Wells for five hundred and twenty dollars.

The other facts are stated in the opinion of the Court.

Crockett & Whiting, for the Livingstons, Appellants, argued that Davis' notice was insufficient, because it did not state that the sum was due over and above all payments and offsets, and that Brokaw & Metcalf's notice was bad, because it did not state what the materials consisted of, or that the materials were used in the building. They also contended that the

agreement of the contractors between themselves, and assented to by the employer, bound the employer, and that, therefore, no lien should attach while this agreement was fulfilled.

R. P. & Jabish Clement, for Respondents, argued that the notices of Brockaw & Metcalf were sufficient, but that if there was any defect in each taken singly, all three might be taken together and considered as one notice, and that thus taken they supplied all defects. They also contended that the liens must be enforced under the original contract between employer and contractor, and that no agreement between the contractors could affect them.

By the Court, SHAFTER, J.

This action was brought to enforce a mechanic's lien upon certain buildings erected for the Livingstons by Sheldon, Gosling & Stebbins, under a written contract. Brockaw & Metcalf intervened, claiming a lien for materials furnished upon the order of the contractors. Brown & Wells also intervened, claiming a similar lien. The answers denied each and every allegation of the complaint and interventions. The cause was tried by the Court and was decided in favor of the plaintiffs and intervenors. The defendants F. and M. Livingston, and Stebbins, one of the contractors, appeal from an order overruling a motion for new trial. There was no judgment affecting Stebbins, and the sole object of the appeal is to release the buildings and premises from the liens to which the decree declares them to be subjected.

Notice of sub-contractor to acquire lien.

First — The only evidence of notice of lien offered on behalf of the plaintiff Davis was the following:

“SAN FRANCISCO, April 29, '63.

“GENTLEMEN: — I hereby notify you that I hold you responsible for the sum of one hundred and twenty-four 70-100

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(\$124 70-100) for turning and materials furnished for your houses on Powell street, ordered by Gosling & Sheldon.

“Yours truly,

WM. DAVIS.

“To Messrs. LIVINGSTONS.”

Among other objections to the notice, it is claimed to be insufficient for the reason that it contains no statement that the amount named is due, “over and above all payments and offsets.”

By the fifth section of the Mechanics’ Lien Law, (Acts 1862, p. 385,) the laborer, workman or material man, or assigns, are required to give, prior to the time when a payment shall become due, “a written notice to the employer of the original contractor, of the nature and extent of their claims against the original contractor or his assigns, over and above all payments and offsets for work and labor done or agreed to be done or materials furnished or agreed to be furnished for such construction or repair.”

The “employer” is responsible to laborers and material men only in the event of notice served in conformity with the statute; and then not in *personam*, but through the intervention of a lien — raised, it is to be observed, by law, in favor of parties with whom the employer may have had no communication. The remedy is an extraordinary one, and therefore all the provisions of the Act must be strictly complied with. (*Walker v. Hauss-Hijo*, 1 Cal. 185; *Bottomly v. Grace Church*, 2 Cal. 91.) The notice, when given, operates as an attachment without the expense of a suit. (*Cahoon v. Levy*, 6 Cal. 296.) But though material men and laborers are allowed to acquire liens upon the property of those to whom they are thus strangers, not only without action brought, but also without bonds or affidavit previously filed, they are still required amongst other things, to serve the employer with a written statement of the “extent of their claims over and above all payments and offsets.” This provision is precise and imperative, and it must be strictly complied with before a lien can attach. It was not complied with here. The

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statement prescribed is a statement of claims as affected by payments and offsets, and there is nothing in the notice given by Davis bearing either directly or indirectly upon that point.

It is insisted for the respondents that the defendants should have returned the notice, or at least have objected to its sufficiency at the time it was served; and that their failure to pursue either of these courses operates as a waiver of all defects. The answer is that the notice was *in invitum*, looking to an attachment under a statute. The question is not as to what the defendants failed to do, but as to what the plaintiffs did.

Second — Three notices were given in evidence, conjointly, to establish the lien of Brockaw & Metcalf.

Each of the notices must stand on its own merits and be perfect in itself.

As to the first notice, it had the same defect as the notice to Davis already considered. The third notice was not signed, and though it purported in the body to come from "Brockaw & Metcalf," yet it was not shown to have been in their handwriting; and if that fact had appeared, no authorities are adduced to show that the want of a signature would have been cured thereby.

The second of the three notices is claimed to be defective for four distinct reasons, viz: that it does not state of what the "materials" named therein consisted; that it does not state that the materials were used in constructing the buildings provided for in the original contract; that it does not sufficiently disclose the nature of the claim against the original contractors; and that the amount claimed is different from that specified in the notice that preceded it.

None of these objections are well taken. The particular character of the materials need not be stated in the notice. The statute does not expressly require it, and the "nature and extent of the claim" may be as well understood without the aid of such detail as with it. (*Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 142.)

It may or may not be necessary for a party claiming a lien for materials under the Act, to aver in his complaint and prove

that the materials he claims to have furnished were in fact used in the construction of the buildings named in the original contract; but it is clear that it is not necessary that it should be so stated in the notice. The statute requires a statement only that the materials "were furnished or agreed to be furnished for such construction or repair."

As to the third objection, we consider that the "nature of the claim" is sufficiently disclosed in the notice. It is put therein as a money claim — for materials and not for labor — furnished by Brockaw & Metcalf for the erection of two certain houses "belonging to you" on Powell street, between Union and Filbert streets, in the City of San Francisco. It is true that the defendants are notified "as the employers of Joseph Gosling, contractor for the erection" of the houses, but the failure to name the two co-contractors does not go very clearly to the nature of the claim, and even if it does, it is but a false demonstration which is set right by the other statements in the notice.

No importance can be given to the circumstance that the amount claimed is larger than that specified in the first notice, for the reason that each notice is to be considered absolutely and not relatively to the others.

As to the notices by Brown & Wells, intervenors, no objection is taken to their sufficiency.

Third — The twenty-fifth section of the Act requires that a statement of the amount due, etc., together with a description of the property to be charged, etc., shall be filed with the Recorder within thirty days after construction or repair of the building, etc., shall have been completed. The defendants claim that the finding of the Court that the complainants complied with this rule is against the evidence. We think the evidence sustains the findings.

Written agreement between contractors apportioning money to be received not binding on others.

Fourth — The defendants offered to prove that by a written agreement between the "contractors," executed at or about

the time the principal contract with the Livingstons was made, Stebbins undertook to do the mason work, and Sheldon & Gosling undertook to do the remaining work; and that it was stipulated that the parties respectively should receive from the Livingstons a fixed proportion of each payment; and that the Livingstons knew of this contract, and assented and agreed thereto. And the defendants further offered to prove that "at the time the liens could attach there was not money enough in the hands of the Livingstons due Sheldon & Gosling (according to the contract between Sheldon & Gosling and Stebbins) to pay off the whole amount of the liens."

The evidence was objected to as irrelevant and immaterial. The objection was sustained and the defendants excepted.

There are a number of grounds upon which the correctness of the ruling may be argued, but we shall not discuss the subject at large.

The offer proceeded upon the hypothesis that the rights of the plaintiffs and of the intervenors were to be determined with reference to the written agreement named in the offer between the contractors Sheldon & Gosling, of the one part, and Stebbins, of the other, coupled with the verbal assent of the Livingstons thereto, instead of the original contract in writing, signed by all the parties and deposited with the architect, whereby Sheldon, Gosling, and Stebbins made themselves jointly liable to the Livingstons for the whole job, and the Livingstons undertook to pay them jointly the whole of the contract price.

It is unnecessary to consider the effect of the new arrangement upon the rights of the parties to it as among themselves. The question is as to the effect of the agreement upon the rights of persons who were not parties to it, and who had no notice that any such arrangement had been made.

In our judgment any agreement between the contractors, apportioning the job and the compensation, supplemented only by the verbal assent of the employers, and that, too, given without consideration, is no obstacle in the way of the liens

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here attempted to be asserted. The Mechanic' Lien Law of 1862 applies to cases where the original contract has been reduced to writing, if the amount to be paid exceeds two hundred dollars (Sec. 12;) and where such contract has been executed, it is provided that the contractors shall have a lien "to the extent of the original contract price" (Sec. 1;) and that the lien "shall inure primarily to the benefit of all persons who as employees of the original contractor or his assigns, shall perform work and labor, or furnish materials for the construction or repair of any such building * * * according to their respective rights and interests." (Sec. 3.) The time when a material man or laborer is to give notice of his contract to the employer has reference solely to the terms of the "original contract." (Sec. 9.) And by section ten the validity of payments, as against material men and laborers, depends upon whether the payments were or were not made prior to the time when they fell due under the terms of the "original contract." In *Dore v. Sellers*, 27 Cal. 588, it is considered that the liens which the Act at once creates and provides for, are based upon the "original contract" between the employer and contractor. It is assumed in the theory of the Act that tradesmen, before furnishing materials to the contractor, and laborers, before entering his service, will inform themselves as to whether a written contract has been made; and if so, then that they will by inspection or otherwise ascertain its provisions; and if they conclude to deal with the contractor, the one supplying him with materials and the other with labor, they are presumed to do so on the faith of the original contract to which they have thus had access. And it follows that no agreement subsequently made between the principal parties, unless seasonably disclosed to the workmen and material men, can be set up to their disadvantage.

But the testimony was objectionable not only on the ground that it went upon the mistaken hypothesis named, but for the reason that it undertook to measure the liens of the plaintiffs and intervenors by the state of the accounts between the Liv-

Livingstons and Sheldon & Gosling "at the time the liens could attach."

Assuming that the extent of the liens depended upon the balance due to Sheldon & Gosling under the apportionment which the defendants offered to prove, it would be the balance due at the time when the notices were given by the claimants of the nature and extent of their claims. The defendants admitting by implication that the balance due Sheldon & Gosling under the alleged apportionments, at the date of the notices, was large enough to pay the claims in full, proposed to show, in effect, that subsequent to the giving of the notices, and within thirty days from the completion of the buildings, the balance was so far reduced as to come short of the full amount of the claims in suit. The evidence was inadmissible as starting a false issue. Had the defendants offered to show that no payments were made in advance of maturity under the original contract, and that neither at the time the notices were given nor thereafter, was there an amount due sufficient to fully liquidate the liens in controversy, the evidence would undoubtedly have been admitted. Proof that the payments had been thus regulated in fact, would have fully protected the Livingstons; and it would have been a matter of no possible concern whether the payments were made to the contractors severally under the alleged apportionment or to them all *in solido*; for as to the original contract constituting the basis of the liens, a payment to one of the contractors would have been a payment to all.

The judgment, in so far as it relates to the claims of Davis, is reversed and new trial ordered. As to the claims of Brown & Wells, the judgment is affirmed; and as to the claims of Brokaw & Metcalf, the judgment is modified by striking out one thousand five hundred and two dollars and fourteen cents and substituting therefor one thousand four hundred and sixty-two dollars and seventy-seven cents — the amount claimed in the valid notice.

Statement of Facts.

Mr. Justice RHODES delivered the following dissenting opinion, in which Mr. Justice CURREY concurred:

I concur in the judgment as to Davis, and Brown & Wells, but I dissent from the judgment for Brokaw & Metcalf, on the ground that neither of the three notices served by them were sufficient, according to the requirements of the statute.

HENRY DERRINGER v. A. J. PLATE.

RIGHT OF PROPERTY IN A TRADE MARK.—The right of property in a trade mark is recognized by the common law, and does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute.

PROPERTY IN TRADE MARK NOT LIMITED BY TERRITORIAL BOUNDS.—The right of property in a trade mark is not limited in its enjoyment by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may properly be made concerning the use and enjoyment of other property.

STATUTE OF 1863 CONCERNING TRADE MARKS.—The statute of 1863 concerning trade marks does not take away the common law remedy for the protection of the same from those who do not register their trade mark according to the provisions of the Act.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The plaintiff averred that he was a resident of Philadelphia, and upwards of thirty years ago invented a pistol known as Derringer's pistol, and adopted as a trade mark for the same the words, "DERRINGER, PHILADEL.," which was and ever since had been his trade mark, and which he had caused to be stamped on the breech of all pistols manufactured and sold by him, and that the defendant since 1858 had been engaged in the manufacture of pistols at San Francisco similar to plaintiff's, on the breech of which he had stamped plaintiff's trade mark, etc. Defendant had judgment on the demurrer and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Nathaniel Holland, for Appellant.

The complaint is sufficient at common law. The principle is well settled that a manufacturer may by priority of appropriation of names, letters, marks, or symbols, acquire a property therein as a trade mark, for an invasion of which an action for damages will lie, and in the exclusive use of which he may have protection, when necessary, by injunction. (*Coats v. Holbrook*, with notes at the end of the case; 2 Stanford Ch., with notes at the end of the case, 286; *Taylor v. Carpenter*, Ib. 603; *Partridge v. Menck*, Barb. Ch., 2 vol. 101.)

The question raised by the respondent in support of the demurrer to the complaint is that the statute concerning trade marks is in effect a repeal of the common law; and the appellant, in order to maintain his action, must show affirmatively that he has complied with the requirements of the Act passed April 3d, 1853. (Statutes 1853, p. 155.) The answer is that the statute does not take away the remedy at common law; that it is an affirmative statute, and that an action may be maintained both at common law and under the statute. The substance of the rule as laid down in the cases is, where the party has a remedy at common law for a wrong, and a statute be passed giving a further remedy without a negative of the common law remedy, expressed or implied, he may, notwithstanding the statute, have his remedy at common law. (*Wheaton v. Hubbard*, 20 Johns. 192; 13 Johns. 322; *Almy v. Harris*, 5 Johns. 175; *Clark v. Brown*, 18 Wend.)

Hoge & Wilson, for Respondent.

In trade mark cases there are three different remedies or classes of cases: 1st—Actions at law for damages. 2d—A bill in equity for an injunction, through which jurisdiction being acquired, other incidental relief is granted. 3d—Criminal prosecutions. (Upton's Trade Marks, 233, 234, 244–246, and cases cited.) The remedy here sought is a bill in equity for an injunction and the incidental relief; and unless the appellant is entitled to the injunction on the case made, there is

no further jurisdiction or power to proceed. (Upton's Trade Marks, 233, 234, 244-246.)

The statute is the only law in this State on trade marks, and supersedes the common law. (*Commonwealth v. Cooley*, 10 Pick. 39; *Mason v. White*, 1 Pick. 542; *Smith's Com.* 904, 905; *Bartlett v. King*, 12 Mass. 545; *Nichols v. Squire*, 5 Pick. 168; *The State v. Conkling*, 19 Cal. 511.)

By the Court, RHODES, J.

This is a suit in equity for an injunction to restrain the defendant from pirating the plaintiff's trade mark, and for the recovery of damages for a violation of the plaintiff's trade mark property.

The defendant's demurrer to the complaint was sustained, and the only question presented the appeal is whether the statute of 1863, concerning trade marks, repealed or abrogated the remedies afforded by the common law in trade mark cases. The plaintiff does not allege a compliance with the provisions of the statute. He contends that the remedies given by the statute are cumulative to those which a party was entitled to at common law, and the defendant insists that the statute forms a "complete scheme" in respect to trade marks, and thereby repeals the common law rules relating to the same subject matter.

Right to a trade mark at common law.

Any name, symbol, letter, figure or device adopted by the persons manufacturing or selling goods, and used and put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time, as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade mark. His right to the trade mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value

except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade mark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other. In order that the claimant of the trade mark may primarily acquire the right of property in it, it must have been originally adopted and used by him — that is, the assumed name or designation must not be one that was then in actual use by others, (Upton's Trade Marks, 46) — and such adoption and use confer upon him the right of property in the trade mark. It was at one time thought that no man could acquire a right to a particular trade mark, (*Blanchard v. Hill*, 2 Atk. 284,) but as the true interests of manufactures and commerce were more fully developed and appreciated, the right of property in trade marks was recognized, and the doctrine has been uniform for many years, that the manufacturer or merchant does possess an exclusive property in the trade mark adopted and used by him. The right of property does not in any manner depend for its inceptive existence or support upon statutory law, though its enjoyment may be better secured and guarded, and infringements upon the rights of the proprietor may be more effectually prevented or redressed by the aid of the statute than at common law. Its exercise may be limited or controlled by statute, as in case of other property, but, like the title to the good will of a trade, which it in some respects resembles, the right of property in a trade mark accrues without the aid of the statute. The right is not limited in its enjoyment by territorial bounds, but subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same; the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs. The manufacturer at Philadelphia who has adopted and uses a trade mark, has the same right of property in it at New York or San Francisco that he has at his place of man-

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ufacture. It was held in *Taylor v. Carpenter*, 3 Story, 450, and *The Collins Company v. Brown*, 3 Kay & Johns, 423, that an alien was entitled to be protected in the ownership of this character of property, equally with the citizen.

Act of 1863 concerning trade marks.

Does not the Act of 1863, instead of constituting a "complete scheme" for the acquisition and protection of property in trade marks, rather proceed on the theory that this species of property did exist, and might thereafter be acquired, under the rules of the common law, and provide that those securing such right according to the provisions of the Act, might have a further or more efficient protection than those who failed to avail themselves of the statute, and relied upon the common law remedies?

The first section, so far as it is applicable to a case of the nature of the present one, provides that when a person who has complied with section two of this Act uses any peculiar name or other trade mark in any manner attached to or connected with any article manufactured by him, to designate it as such, it shall be unlawful for any other person, without the consent of the former, to use said trade mark or name for the purpose of representing any article to have been manufactured "by the person rightfully using such trade mark or name." The second section provides that "any person wishing to secure the exclusive use of any such trade mark or name, under the provisions of this Act, shall file his claim to the same, and a copy or description of such trade mark or name with the Secretary of State." It is provided by section three, that the Secretary of State shall keep a record of trade marks and names filed with him; and by section four it is provided that persons violating the provisions of section one shall be deemed guilty of a misdemeanor, punishable by fine and imprisonment, and shall be liable to an action for damages.

Section five declares the counterfeiting of such trade mark or name a misdemeanor, and provides for its punishment. Section six prohibits the use of such trade mark or name for the

purpose of disposing of any other article than that to which it was originally attached, with intent to deceive or defraud, and provides for its punishment as a misdemeanor; and section seven provides for the punishment of those who aid or abet the commission of the offenses declared in the Act to be misdemeanors. Up to this point the Act is dealing with trade marks filed with the Secretary of State, and granting protection to the rights of property therein of those who avail themselves of the provisions of the Act, and no reference is made to the right of property in, or the use of trade marks by those who before the taking effect of the Act, whether residing within or without the State, had acquired a right to their use. Sections eight and nine, however, do provide for those cases; and to make it clear that the Legislature did not even attempt to divest persons of existing rights of property, nor perhaps to preclude them from acquiring title as they had formerly done; by adoption and use, it is provided that the Act "shall not be so construed as to permit any person to file, without authority from the owner, any trade mark or name owned or previously used by another person," thus recognizing, not only existing rights of property, but also the rules of the common law under which persons become the owners of trade marks, without having the same registered by the Secretary of State. It is nowhere declared, either directly or indirectly, that property in a trade mark can be acquired only in the mode provided by the Act; but, on the contrary, it appears by collating sections one and ten, that no one is permitted to file his claim with the Secretary of State unless he is the exclusive owner of the trade mark.

Section nine is an affirmance of the common law, and declares that the person who has first adopted and used a trade mark, "whether within or beyond the limits of this State, shall be considered its original owner, with full right of property, and entitled to the same protection by suits at law" as in the case of other personal property.

The defendant's construction of the section, which would

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make it read, that the person who first adopts and uses a trade mark, shall be considered the original owner, and as such entitled to protection, etc., "provided he files his claim according to the provisions of this Act," cannot be supported. With that construction it amounts to a useless repetition of previous provisions, for the Act had already constituted the person filing his claim to his trade mark, its owner, by giving him its exclusive use, and protecting him against counterfeiting and pirating by means of actions at law and criminal prosecutions, and in a subsequent part of the Act—section eleven—he is granted the aid of an injunction. It would be scarcely reasonable—though it might be highly beneficial to the Library Fund—to hold that the Legislature intended that not only those, who wished to receive the benefit of the more effective protection afforded by the Act, must file their claim with the Secretary of State, and pay the fees, but that the same must be done by all the merchants and manufacturers, not only in this State, but in all of the States, and in every country that maintains commercial relations with California, if they desired to be considered in this State, the owners of their trade marks, and to receive the protection accorded by law to the owners of other personal property.

Common law remedies for invasion of trade marks.

At common law, the remedies for invasions of trade mark property were an action at law for the recovery of damages, and an injunction, in which case pecuniary compensation might be incidentally awarded. Several of the States have, by statute, added a criminal prosecution as a further remedy or protection. The remedies at common law, are still left by our statutes in those cases where the trade mark has not been registered according to the Act, for not only is the right of property recognized and affirmed as it existed at common law, and the common law remedies are not taken away, but the protection afforded by suits at law and bills for injunctions is expressly conceded. Those provisions add nothing to the rights previously possessed by the owner of the trade mark,

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and are only in affirmance of the common law. But he does not have the aid of a criminal prosecution for his protection.

On the other hand, those owning trade marks, who have filed their claims and affidavits, and paid the fees, have the protection accorded to the other class of cases, and have also that arising from the criminal prosecutions, with penalties, upon conviction, of more than usual severity.

We do not fully agree with counsel for either party in his construction of the Act in respect to its relation to and effect upon the common law remedies. The remedies provided by the Act, at least those applicable to registered trade marks, are not cumulative to those possessed at common law, but in that respect provision is made by the Act for a new case; nor do we think the Act forms a "complete scheme" of itself, in the sense that counsel regards it, as requiring all trade marks to be registered under the Act, to entitle them to protection; though it may be regarded as a "complete scheme," in the respect that it grants certain remedies in cases of registered trade marks, and expressly reserves to the owners in other cases the usual remedies enjoyed at common law.

Judgment reversed, and the cause remanded, with directions to the Court below to overrule the demurrer.

JOHN H. SAUNDERS AND CLEMENT BOYREAU v.
WILLIAM S. CLARK.

CONSTRUCTION OF WRITTEN CONTRACT.—Where any doubt exists as to the true meaning of a written contract, the conditions and motives of the contracting parties, as shown by its recitals, or by outside evidence, must be looked into to ascertain what was the real intention of the parties, which, when ascertained, must prevail over the literal sense.

MEANING OF WORDS OR PHRASES IN WRITTEN CONTRACT.—Where it is apparent that the parties to a written contract have attached to certain words or expressions a particular meaning in one part of a contract, it must be presumed, nothing appearing to the contrary, that the same meaning was intended wherever like words or expressions are subsequently used.

CONTRACT WITH TWO CONSTRUCTIONS.—Where a contract admits of two constructions, one of which nullifies the contract, and the other upholds it, the former must be discarded and the latter adopted.

Statement of Facts.

PLAINTIFFS, who claimed as assignees of the contract, brought an action against defendant, who, by mesne conveyances, had acquired Baker's interest in the lot, to enforce the contract as a mortgage on the premises. Defendant demurred to the complaint; the demurrer was sustained, and plaintiffs declining to amend, judgment by default was rendered for defendant, and plaintiffs appealed.

The following was the contract on which suit was brought:

"THIS AGREEMENT, made and entered into this 23d day of August, A. D. 1853, by and between Jacob P. Leese, of the City and County of Monterey, in the State of California, and Gregory Yale, of the City of San Francisco, and State of California, of the parties of the first part, and George W. Baker, of the City and County of San Francisco, State of California, the party of the second part, witnesseth:

"WHEREAS, the said Jacob P. Leese, one of the said parties of the first part, together with one Salvador Vallejo, did obtain a grant of two one hundred vara lots, situated in the City of San Francisco, in the month of May, 1839, from Alvarado, then Governor of California, by petition, according to the forms of Mexican law, in such cases made and provided, said grant being now before the Board of Land Commissioners established by the Government of the United States for their adjudication; and, whereas, the said Leese has purchased by deed of conveyance all the right, title, and interest of the said Salvador Vallejo, in and to the said grant of land, said deed dated on or about the 3d day of August, A. D. 1850, and recorded in the office of the Recorder for the County of San Francisco, in Liber 15 of Deeds, p. 173; and, whereas, the said Leese has sold to the said Yale the one undivided interest of said two one hundred vara lots, as described in said grant, by deeds of conveyance, bearing date on the 22d day of August, 1853; and, whereas, the said parties of the first part are not now in the actual possession of said land described in said grant, but are now engaged in prosecuting their claim thereto for the said possession, and intend further to prosecute the same:

Statement of Facts.

"Now be it understood by these presents, That the said parties of the first part have by deed of conveyance bargained, sold, released, remised, and conveyed unto the said party of the second part, all their right, title, and interest to a portion of said grant of land, being a full fifty vara lot on the corner of Broadway and Battery streets, and known and marked on the official map of the City of San Francisco as lot No. 327, as will more fully appear by reference being had to said deed, bearing even date herewith, for and in consideration of the sum of fifty thousand dollars, to be paid as follows, viz: The sum of five thousand (\$5,000) dollars to be paid upon the execution and delivery of these presents, and the remaining sum of forty-five thousand (\$45,000) dollars to be paid upon the recovery of the possession of said land, or in proportion to any part thereof, the said party of the second part having the privilege of retaining one half of the said sum of forty-five thousand dollars at one per cent interest per month in advance for the period of twelve months after recovery of said possession, if he should elect to do so.

"And the said party of the second part, for himself, his heirs, and assigns, covenants and agrees to pay to the said parties of the first part, or their assigns, the said sum of forty-five thousand dollars when they shall have legally recovered possession thereto, subject to the provisions aforesaid as to payment, provided said grant of land is so decided as to include the above described fifty vara lot number three hundred and twenty-seven, (327,) as described in said deed of conveyance.

"And it is further understood by the contracting parties, that this instrument of writing is not intended to act as a mortgage or lien upon the described premises, or any part thereof, before the recovery of the possession thereof, as herein provided; that is to say, subject to the lien or mortgage for the payment of said sum of forty-five thousand dollars and interest thereon.

"In witness whereof, the aforesaid contracting parties have

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hereunto set our hands and seals the day and year first before written.

"JACOB P. LEESE. [SEAL.]

"GREGORY YALE. [SEAL.]

"GEO. W. BAKER." [SEAL.]

Saunders & Campbell, and J. B. Felton, for Appellants.

Clarke & Carpentier, for Respondent.

By the Court, SANDERSON, C. J.

Under the construction which we put upon that portion of the agreement which specifies the conditions upon which the money was to become due and payable, it becomes unnecessary to determine whether the agreement was intended to operate as a mortgage or not; for, if as we hold, the money became due on the 3d of March, 1858, the date of the patent, and not on the 9th day of February, 1863, (the date at which possession of the land included in the patent, except lot No. 327, was recovered,) as claimed by counsel for the plaintiffs, the cause of action was barred by the Statute of Limitations before the suit was commenced. Hence our interpretation of the contract will be mainly confined to that portion which relates to the covenant on the part of the vendee (Baker) in regard to the payment of the forty-five thousand dollars therein specified, which is in the following language: "And the said party of the second part, for himself, his heirs and assigns, covenants and agrees to pay to the said parties of the first part, or their assigns, the said sum of forty-five thousand dollars, *when they shall have legally recovered possession thereto, subject to the provisions aforesaid, as to payments, provided said grant of land is so decided as to include the above described fifty vara lot number three hundred and forty-seven (347) as described in said deed of conveyance.*" The words which we are called upon to interpret are in italics.

The paragraph immediately preceding the foregoing describes the subject matter of the contract, which is fifty vara lot No.

327, part of a Mexican grant for two one hundred vara lots, claimed by the parties of the first part, (Leese and Yale,) and also specifies that the forty-five thousand dollars in question is "*to be paid upon the recovery of the possession of said land, or in proportion to any part thereof.*" Obviously, according to grammatical usage, "fifty vara lot No. 327" is the antecedent of the word "thereto," used in the paragraph directly under consideration; and it is plain that the money in question was not to become due until the vendors had "recovered possession" of lot No. 327. But, independent of the rules of grammar, this relation is obvious from the nature of the transaction; for Baker acquired no interest in the grant except so far as lot No. 327 might be affected by it, and he could therefore have had no intelligible object in stipulating as a condition precedent to the payment of the money, for a "recovery of the possession" of any part of the grant other than that which he was purchasing. Moreover, he was not to pay the full sum unless the "recovery" included the entire lot; and if it included less than the entire lot, he was only to pay in proportion to the amount "recovered" which circumstance renders the relation in question still more apparent.

So much being established, it only remains to determine what is meant and intended by the parties when they speak of "the recovery of the possession of lot No. 327." In the text of the instrument this expression occurs three times, as follows:

First — "The remaining sum of forty-five thousand dollars to be paid upon *the recovery of the possession* of said land, or in proportion to any part thereof."

Second — "Said sum of forty-five thousand dollars" (is to be paid) "when they" (the vendors, Leese and Yale) "shall have legally recovered possession thereto" (lot No. 327), "provided said grant is so decided as to include" said lot.

And, lastly — "This instrument of writing is not intended to act as a mortgage or lien upon the described premises before the recovery of the possession thereof, as herein provided."

Construction of a written agreement.

Abstractly considered, the plain and obvious import of this language would be to the effect that the vendee was not to pay the purchase money, beyond the sum of five thousand dollars until the vendors had obtained the actual possession of the lot by an action upon their title brought expressly for that purpose. But we think it is clear from all the circumstances of the case that the language in question was not used in that sense. Where any doubt exists as to the true meaning of a written instrument, it must all be read together and in the light of surrounding circumstances. We must consult the condition and motives of the contracting parties as developed either by the recitals in the instrument if such there be, or by outside matters resting in evidence, for the purpose of ascertaining what was the real intention of the parties, which, when accurately ascertained, must always prevail over the literal sense of terms. (*The People v. Utica Insurance Company*, 15 John., 380; *Whitney v. Whitney*, 14 Mass. 92.) These circumstances are detailed in the complaint, which, for the purposes of our decision must be taken as true; for the question before us is presented upon demurrer. They are substantially as follows: Baker, the vendee, was in actual possession, *without any title whatever*. Leese and Yale, the vendors, were the owners and holders of a Mexican grant which they claimed to be valid, and which would, as they claimed, when confirmed and located, embrace the lot in question. This grant had been presented to the Board of Land Commissioners established by the Government of the United States for the purpose of adjudicating upon all such claims, and was still pending before them, undetermined. Their title, if they had any, was inchoate, and might or might not become perfect. Under these circumstances the parties meet, they of the first part to sell and he of the second part to buy. The vendee is willing to give five thousand dollars unconditionally, and to that extent take the chances. If, however, the title proves to be good, he is willing, upon that condition,

to give the further sum of forty-five thousand dollars. The vendors accept the proposition, and thereupon they proceed to reduce their contract to writing, and now the question arises as to what shall be the test of the soundness of the title. For the purpose of defining the test the language in question is adopted. What do they mean by it? Under all the circumstances but two intents can be claimed. One, that the vendors should recover actual possession by an action of ejectment founded upon their title; the other, that they were to prosecute their claim before the Board of Land Commissioners and obtain a patent from the Government of the United States which should include the lot in question or some part thereof. We cannot accept the first as the true intent, because it is an impossible intent, and would defeat and nullify the contract; for the vendors were to execute and deliver to the vendee a deed of the lot (thereby parting entirely with the title upon which they must have depended to recover possession) contemporaneously with the execution of the agreement in question, which would render a recovery of the possession in the sense under consideration a legal impossibility. Hence, under well established rules of construction, this intent cannot be adopted. Where a contract admits of two constructions, one of which nullifies the contract and the other upholds it, the former must be discarded and the latter adopted; for there is no presumption against the validity of contracts, and it is not to be presumed that parties deliberately enter into an agreement which calls for an impossible condition or event as a test of performance.

Moreover, this agreement affords internal evidence in support of the latter intent. Where it is apparent that the parties to a contract have attached to certain words or expressions a particular meaning, it must be presumed, nothing to the contrary appearing, that the same meaning was intended wherever like words or expressions are subsequently employed.

From the recitals found in the fore part of the instrument, it appears that the vendors are the owners and holders of a

Mexican grant for two one hundred vara lots in the City of San Francisco, which had already been presented to the Board of Land Commissioners and was then pending before them for adjudication, and, for aught that appears, that was the only action or legal proceeding touching the land in question then existing to which the vendors were parties. In a subsequent recital we find the following language: "And whereas, the said parties of the first part are not now in the actual possession of said land *described in said grant*, but are now engaged in prosecuting *their claim thereto for the said possession*, and intend *further* to prosecute the same."

While it must be admitted that the language here employed is far from being the most appropriate to an apt expression of the intent which we are compelled to accord to it, we think there can be no rational doubt as to what the true meaning of the passage is. They here speak of a claim for the possession which they are "*now*" engaged in prosecuting, and which they intend to "*further*" prosecute to a final result. This description, however inexact it may be, cannot possibly refer to any other action or proceeding than that then pending before the Board of Land Commissioners, for there was no other action pending at the time, and which they could intend to "*further*" prosecute. While that was not, in a strict sense, an action for the possession, yet they characterize it as such, and thereby indicate clearly what they mean when they speak of "*recovering the possession of the land*."

Again: In the last clause of the instrument we find the following expression. * * * * "Before the recovery of the possession thereof, *as herein provided*." Now there is no "*recovery of the possession*" provided for in the instrument, except such as might result from a confirmation of their claim by the Board of Land Commissioners and the procurement of a patent from the Government of the United States.

For the foregoing reasons, briefly stated, we think that the test of the soundness of the vendors' title agreed upon between the parties was to be a patent from the Government of the United States, and when that was obtained, the money was

Argument for Respondent.

to become due and payable. It follows that the money became due on the 3d of March, 1858, five years seven months and twenty-five days prior to the commencement of this action, and that an action therefor, whether the instrument be a mortgage or a mere personal obligation, cannot be maintained in the presence of the Statute of Limitations, which the defendant has called to his aid.

Judgment affirmed.

MANUEL CARIAGA v. WILLIAM G. DRYDEN, COUNTY
JUDGE OF LOS ANGELES COUNTY.

WRIT OF MANDATE.—A judgment rendered by a Court in a case where it had jurisdiction will not be disturbed by a writ of mandate, however erroneous.

WRIT OF MANDATE TO COUNTY JUDGE.—If a County Judge renders an erroneous judgment in a matter where he possesses jurisdiction, a writ of mandate will not be awarded to compel him to render a different judgment.

JURISDICTION OF JUSTICE'S COURT.—Three suits were commenced in a Justice's Court for the recovery of the same property, the value of which was less than three hundred dollars, which were consolidated; *held*, that the Court had jurisdiction of the action as consolidated.

APPEAL from the District Court, First Judicial District, Los Angeles County.

The facts are stated in the opinion of the Court.

J. McM. Shafter, for Appellant, argued that the order was erroneous, as it commanded the kind of judgment which was to be entered, and cited *The People v. Sexton*, 24 Cal. 78; *Ex parte Ostrander*, 1 Denio, 679; *People v. Supr. Greene*, 12 Bar. 217; *People v. Supr. Westchester*, 15 Bar. 607; *People v. Supr. Westchester*, 24 Bar. 166.

Gitchell & Chapman, for Respondent, argued that mandamus was the proper remedy, and cited 2 Cal. 245; 4 Id. 177; 7 Id. 276; 18 Id. 89; 22 Id. 35.

Opinion of the Court — Currey, J.

By the Court, CURREY, J.

Appeal from a judgment of the District Court of the First Judicial District granting a peremptory writ of mandamus directed to the defendant, commanding him to enter judgment in favor of Manuel Cariaga, plaintiff, against Thomas A. Sanchez and others, defendants, in accordance with the verdict of a jury in a certain action tried in the County Court of Los Angeles County. In August, 1864, Cariaga commenced three actions in a Justice's Court for the recovery of the possession of a certain quantity of barley. In one of these actions said Sanchez, Paul R. Hunt and J. Jacob Smith were defendants. In another, Sanchez, Hunt and Thomas Garvey were defendants; and in the third, Sanchez, Hunt and Samuel Shrewsbury were defendants. These several actions were for the same barley, alleged to be of a certain value less than three hundred dollars. On the application of the defendants they were consolidated, as authorized by section five hundred and twenty-six of the Practice Act, made applicable to Justices' Courts and actions therein, by section six hundred and thirty-five of the same Act. The plaintiff, upon the trial of the consolidated actions in the Justice's Court, had judgment. An appeal was taken on questions of law and fact to the County Court, where the same action was tried again before a jury, and a verdict was rendered for the plaintiff, whereupon the defendants moved in arrest of judgment, on the ground that the sum claimed in the action as consolidated exceeded the jurisdiction of a Justice's Court, and that of the County Court also on appeal. The motion was granted and the action dismissed. The plaintiff then applied to the District Court for a mandamus, to compel the County Judge to enter judgment in the consolidated action, in accordance with the verdict of the jury. An alternative writ was issued, to which the County Judge filed an answer. The District Court determined the issue joined in favor of the plaintiff, and a peremptory writ was accordingly issued, commanding the County Judge "to enter up judgment for plaintiff, in accordance with the ver-

dict of the jury in the case as of record, and as found by the jury," etc. To this decision the County Judge excepted, after which he obeyed the peremptory mandate of the District Court.

The value of the property in the three actions which were consolidated, was less than three hundred dollars. The verdict of the jury was that its value was two hundred and forty-three dollars and seventy-five cents. The County Court, having jurisdiction, was in duty bound to enter judgment in accordance with the verdict. But instead of this, the Court, having the power, ordered the judgment obtained in the Justice's Court to be reversed and the cause dismissed. This was palpably erroneous, but as it was an act within the jurisdictional power of the Court, the wrong could not be redressed through the medium of a writ of mandate. In the case of *The King v. The Justices of Monmouthshire*, 7 Dow. and Ryl. 334, the Court said: "When the Sessions forbear to give any judgment at all, this Court will interpose to compel them to go on and pronounce judgment; but when they have actually given judgment, even under a mistake of law, this Court has never yet interposed to disturb their decision." (*People v. Sexton*, 24 Cal. 83, 84.) In this case the County Court did go on and render a judgment which could not be disturbed by means of a writ of mandamus.

The judgment awarding the writ of mandate must be and is hereby reversed.

Mr. Justice RHODES expressed no opinion.

GEORGE HAGAR v. J. B. LUCAS *et als.*

PATENT FOR MEXICAN GRANT OF LAND.—A patent issued by the United States for land granted in California by Mexico or Spain, is not void because the grantee of Mexico or Spain had received grants for more than eleven square leagues before the grant on which the patent issued.

ATTACK ON PATENT IN COLLATERAL ACTION.—Parties who do not set up title in themselves, derived from the United States, cannot, in a collateral action

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brought by the patentee, attack a patent for land issued by the United States in confirmation of a Mexican grant, on the ground that the grantee of Mexico had received grants of more than eleven leagues before the grant on which the patent was issued.

STATEMENT ON APPEAL.— If there is nothing in the statement showing that it is a statement on motion for a new trial, and the statement declares that the motion for a new trial was overruled, it will be regarded as a statement on appeal.

APPEAL from the District Court, Sixth Judicial District, Yolo County.

The defendants, in their answer, denied plaintiff's title, but set up no title in themselves, nor did they offer any evidence of title in themselves. Plaintiff recovered judgment, and defendants appealed.

The other facts are stated in the opinion of the Court.

C. D. Semple, and *H. G. Burnett*, for Appellants.

The grant and patent under which plaintiff claims is void, having been issued against the prohibition of statute, and also the officer granting had no power. (See *Colonization Laws of Mexico*, 12th Sec.; *United States v. Hartnel's Executors*, 22 How. 286; 1 Black. 132; *United States v. P. B. Reading*, 18 How. 1.)

George Cadwalader, for Respondent, *contra*, cited *Semple v. Hagar*, 27 Cal. 163.)

By the Court, RHODES, J.

This is an action of ejectment, brought to recover possession of a portion of the Jimeno Rancho. The respondent moves that the statement on the motion for a new trial be stricken out and disregarded. There is nothing in the transcript that purports to be a statement on motion for a new trial, nor can the statement found in the transcript be regarded as made on motion for new trial, for it is set forth in the statement preceding the certificate of the Judge that the motion for a new trial was overruled, whereupon the defen-

dants excepted, etc., which makes it apparent that it was intended as a statement on appeal.

When the plaintiff offered in evidence the patent from the United States for the Jimeno Rancho, the defendants objected on the ground that it was void because more than eleven leagues of land had been granted to Manuel Jimeno Casarin, the grantee of the Jimeno Rancho, by the Governors of the Californias, prior to the making of said grant. The objection was overruled by the Court. Subsequently the defendants offered to prove that prior to the date of the Jimeno grant, the Governors of the Californias had granted to Jimeno two tracts of land containing more than eleven square leagues of land, which Jimeno afterwards sold to other parties, who procured patents therefor from the United States. Upon objection being made, the Court excluded the evidence. The ruling of the Court in these respects is assigned as error.

This question is identical with that presented in *Semple v. Hagar*, 27 Cal. 163, and must be decided adversely to the defendants upon the principles announced in that case. Besides this, there is no just ground for holding the patent to be void, because of the prior grants alleged to have been made to Jimeno. If such were the facts, the utmost that could be said is that the decree of confirmation was erroneous, and that the subsequent proceedings founded upon it, among which was the issuing of patent, were also erroneous. It cannot be claimed that the patent is absolutely void. It requires no argument to show, that under such circumstances, it is not competent even for the United States, and certainly not to parties who do not set up title in themselves derived from the United States, to attack the patent collaterally. (*Stringer v. Young's Lessees*, 3 Pet. 320; *Boardman v. Reed's Lessees*, 6 Pet. 328; *Bagnell v. Broderick*, 13 Pet. 436.)

Judgment affirmed.

Opinion of Sawyer, J., concurring specially.

SAWYER, J., concurring specially.

There is nothing in the record to show that respondent ever had notice of the motion for a new trial, or that he in any way participated in those proceedings. But conceding the statement to be properly before us, it presents but one question, and that has often been decided adversely to the appellants. Respondent introduced a patent from the United States, issued in pursuance of a decree confirming a Mexican grant embracing the land in question, and deraigned title from the patentee. Appellants—who, so far as shown by the record, are naked trespassers—offered to show the matter *dehors* the patent, that the grantee in the said Mexican grant had, before the making of said grant, received grants of other lands exceeding eleven square leagues, and that said grant was therefore void. The Court properly rejected the evidence, if for no other reason, on the ground that defendants have no such status as enables them to raise the question. It was substantially so decided in *Doll v. Meador*, 16 Cal. 331, and the principle there stated was recognized as correct by this Court in *Terry v. Megerle*, 24 Cal. 629. It was also affirmed in *Carder v. Baxter*, 28 Cal. 99, and there is nothing to the contrary in any decision brought to our notice.

The evidence was also properly rejected upon the principles determined in *Semple v. Hagar*, 27 Cal. 163, arising under the same patent.

I therefore concur in the affirmance of the judgment.

MARIA O'CONNOR v. PHILIP H. BLAKE.

PRIOR ACTION PENDING AS A DEFENSE.—The defense of a prior *lis pendens* is available only where the plaintiff at least, in both actions, is the same.

DEBTS ON WHICH ATTACHMENTS MAY ISSUE.—An attachment may be issued on a debt contracted at any time since the passage of the Practice Act, April 20th, 1851.

PRACTICE ACT CONCERNING ATTACHMENTS.—The words “made after the passage of this Act,” in the Act concerning attachments, are not limited to debts

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contracted after the amendment of the Act in 1860, but refer to the Act as passed in 1851.

RETURN OF OFFICER ON ATTACHMENT.—Where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession.

JUDGMENT FOR DEFENDANT DISSOLVES AN ATTACHMENT.—In case of a dismissal of an action by a Justice of the Peace for non-appearance of the plaintiff, the judgment for defendant operates as a dissolution of an attachment, although the Justice reinstates the case, and the parties appear and try it.

POWER OF JUSTICE TO VACATE A JUDGMENT.—A Justice of the Peace has no power to vacate a judgment of dismissal on the ground of non-appearance of the plaintiff, and reinstate the case.

JUDGMENT IN REPLEVIN.—In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

In the case of *Otis v. Barrett*, the Constable, in his return on the attachment, stated that he had attached the right, title, and interest of the defendant in the property, the same being then in his possession. The plaintiff appealed from the judgment, and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

Eugene B. Drake, for Appellant, on the question of the officer's levy under the *Otis* attachment, cited *Taffts v. Manlove*, 14 Cal. 51, and *Westervelt v. Pinkney*, 14 Wend. 123; and on the question of the dismissal of the action dissolving the attachment, cited 9 Johnson, 140, and 5 Hill, 428.

P. G. Buchan, for Respondent.

By the Court, SANDERSON, C. J.

Action against a Constable to recover the possession of personal property taken by him under an attachment. Trial by the Court, judgment for defendant, and new trial denied.

The defendant's answer contains three separate and distinct defenses. First—That the property in question belonged to one Stuart, and that the defendant held the same by virtue of an attachment against Stuart, at the suit of Heywood & Harmon; second — That there was a former suit pending between one Barrett, plaintiff's vendor, and defendant to recover the same goods; and third — That the goods were the property of said Barrett, and the defendant held the same under an attachment against Barrett, at the suit of one Otis.

At the trial the plaintiff proved a *prima facie* case, and rested. The question submitted to us, broadly stated, is whether at the trial the defendant sustained either of his defenses.

He failed to sustain his first defense because he failed to offer any evidence of title to the goods in Stuart at the date of the levy of the Heywood & Harmon attachment.

When another action pending is a bar.

He also failed to sustain his second defense because the pendency of a former suit by Barrett, the plaintiff's vendor, was no bar to this action. The defense of a prior *lis pendens* is available only where the plaintiff at least, in both actions is the same person. (*Certain logs of mahogany*, 2 Sumner, 593; *Wadleigh v. Veazie*, 3 Sumner, 165.)

Attachment issued out of Justice's Court, and levy of.

Against the right of the defendant to hold the goods under the Otis attachment which was levied (if levied at all) prior to the sale from Barrett to plaintiff, three grounds are urged by appellant: First, that *Otis v. Barrett* was not a case in which a Justice of the Peace could lawfully issue an attachment; second, if it was such a case the attachment was never issued according to law; and, third, if it was lawfully levied the lien thereunder was lost by reason of the subsequent dismissal of the action, notwithstanding such dismissal was afterwards set aside and a new trial granted at which the plaintiff recovered a judgment.

The cause of action in *Otis v. Barrett* was a promissory note, payable on demand, and bearing date on the 27th of May, 1856, and renewed by Barrett on the 17th of April, 1860.

This contract having been made prior to the 28th day of April, 1860, the date of the last amendment of the five hundred and fifty-first section of the Practice Act concerning attachments in Justices' Courts, it is claimed that no attachment could issue thereon because the words "made after the passage of this Act" limit the right to an attachment to contracts made after the 28th day of April, 1860, which view is manifestly untenable.

That portion of section five hundred and fifty-one which defines the contracts upon which attachments may be had, is now and always has been the same since the Practice Act was passed, on the 29th day of April, 1851. In that respect no change was made by the amendatory Act of the 28th of April, 1860. Hence the words "this Act" obviously refer to the Practice Act of 1851, and not to the amendatory Act of 1860.

Levy of an attachment.

The second point, to the effect that there was no valid levy of the Otis attachment, is also untenable in our judgment. The property was already in the possession of the defendant under the Heywood & Harmon attachment. It was therefore unnecessary to make a seizure under the Otis attachment, nor was it possible for the defendant to make a second taking of that which he had already taken and still retained in his possession. All therefore which he was called upon to do in order to effect a valid levy, was to so return upon the back of the attachment, which was done we think substantially in conformity with the statute. (*Ritter v. Scannell*, 11 Cal. 238.)

Lien of an attachment ceases on dismissal of suit.

We are inclined to think, however, that the third point, to the effect that the lien under the attachment ceased upon the dismissal of the action in which it was issued, is well put.

The one hundred and thirty-fifth section of the Practice Act, which is made applicable to Justices' as well as District Courts, provides that if the defendant recover judgment all property attached, etc., remaining in the hands of the Sheriff shall be delivered to the defendant, and the attachment shall be discharged and the property released therefrom. In case of a dismissal of a suit for non-appearance of the plaintiff, it must be held that the judgment for the defendant *ipso facto* operates as a dissolution of the attachment. We find no provision authorizing a Justice of the Peace to vacate a judgment and reinstate the cause after a judgment of dismissal on the ground of the non-appearance of the plaintiff as provided in sections five hundred and eighty-six and five hundred and ninety-one. Section six hundred and twenty-two relates only to new trials and has no application. When once properly dismissed on the grounds stated, the case is out of Court and the proceedings ended, and the Justice has no further control over it. (*Speyer v. Shed*, 9 John. 140; *Hunt v. Weekwan*, 10 Wendell, 104.) The Justice in this case afterward reinstated the case and rendered judgment for plaintiff. As the defendant appeared in the action and submitted himself anew to the jurisdiction of the Court the judgment may be binding upon him, but the action thus restored could not affect the rights of strangers.

Judgment in action to recover possession of personal property.

The right of the defendant, therefore, to retain the property ceased at half past four P. M. on the 17th of March, eighteen hundred and sixty-three, at which time a judgment of dismissal was entered in *Otis v. Barrett*. But the demand and refusal upon which the present action was brought were made on the morning of that day, and this action was actually brought and the property taken from the custody of the defendant at least an hour and a half before the judgment in *Otis v. Barrett* was rendered. Hence the defendant's right to the possession of the property was perfect at the time he refused to deliver it to the plaintiff, and at the time this action was brought, but ceased before the trial, and at the time of

the trial he had no right to its possession. The only question remaining is as to what the judgment of the Court ought to be where such are the conditions.

In actions of this character both plaintiff and defendant are to be considered as actors, (1 Chitty's Pleading, 165;) and where, as in the present case, the plaintiff has obtained possession of the property in dispute at the commencement of the action and the defendant asks for a return of the property in his answer, he to that extent is an actor and stands in the attitude of a plaintiff, and if at the trial it shall appear that he is not entitled to the possession for the reason that his interest therein has ceased intermediate the commencement of the action and the trial, and the right to the possession has vested in the plaintiff, the Court will not render a judgment in favor of the defendant for the possession of the property or its value, but will leave the property in the possession of the plaintiff where it belongs, and give the defendant a judgment for costs only.

It follows that the judgment must be modified by striking out all except that relating to costs.

And it is so ordered.

Mr. Justice RHODES expressed no opinion.

WILLIAM ROBINSON v. W. G. FORREST.

PRE-EMPTIONER MAY ATTACK STATE PATENT.—A person who has settled upon and claimed as a pre-emptioner unsurveyed public land of the United States, before a sale of the same as swamp and overflowed land, and the issuance of a patent therefor by the State, is in such privity with the title of the United States as enables him to attack the patent by showing that the land is not swamp and overflowed.

EVIDENCE THAT LAND IS SWAMP AND OVERFLOWED.—A patent of the State, for land sold as swamp and overflowed, before the same has been listed to the State by the United States as swamp and overflowed land, is not conclusive evidence of the character of the same, but parol evidence may be introduced to show whether it is dry, or swamp and overflowed.

LEGAL SUBDIVISIONS OF PUBLIC LAND.—The phrase "legal subdivisions," as used in the Act of Congress, passed September 28th, 1850, relating to swamp and overflowed lands, refers to the smallest subdivision under the Congressional system of surveys.

Argument for Respondent.

STATE OWNERSHIP OF SWAMP LANDS.—The doctrine that the State is the owner of all swamp and overflowed lands in its limits, as laid down in *Summers v. Dickinson*, 9 Cal. 554, and *Kernan v. Griffith*, 27 Cal. 87, modified.

PLAT OF UNITED STATES SURVEY AS EVIDENCE.—In the trial of an issue between one claiming under the State, and a pre-emption claimant, as to whether a particular tract of land is swamp and overflowed, the approved plat of the survey by the United States is admissible in evidence to show the lines of the legal subdivisions, but not to prove that the lands are swamp and overflowed.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

This action was commenced July 30th, 1863.

The other facts are stated in the opinion of the Court.

P. L. Edwards, for Appellant, contended that a patent could not be impeached by parol evidence in ejectment, and cited 1 Scam. 156; *The People v. Livingston*, 8 Barb. 253; *Curl v. Barrell*, 2 Smeede, 68; *Parker v. Claiborne*, 2 Swan, 595, and *Sargent v. Doe*, 34 Miss. 118.

He also insisted that the respondent had no title upon which he could defend, and cited *Richardson v. Robinson*, 9 Missouri, 801; *Terry v. Megerle*, 24 Cal. 610; *Sarpy v. Pepin*, 7 Missouri, 503, and *Summers v. Dickinson*, 9 Cal. 554. He also insisted that the plat of survey was admissible in evidence to show that the United States had recognized the land as swamp and overflowed.

Budd & Carr, for Respondent, argued that defendant had a right to show that the patent conveyed to the plaintiff no title from the State, and cited *Patterson v. Winn*, 11 Wheat. 380; *Winter v. Crommelin*, 18 How. 87, and also insisted that a pre-emptioner on unsurveyed land connected himself with the title of the United States, and cited *Kile v. Tubbs*, 23 Cal. 432; Vol. 12 Laws of U. S. p. 410, Sec. 7; Id. Vol. 10, Pages 305, 309, 310, Secs. 10 and 12; *McAfee v. Keim*, 7 Smeede and Marshall, 780; and *Little v. State of Arkansas*, 9 How. 333.

By the Court, RHODES, J.

This is one of a very large class of cases, presenting questions of conflict between titles derived from the State, under a sale of land as swamp and overflowed land, and titles or claims derived directly from the United States which, in consequence of the great delay that has occurred in definitely ascertaining the lands that inured to the State, under the Swamp Land Act of Congress of the 28th of September, 1850, promises to become still more numerous. The action is ejectment, and was brought in December, 1863. The plaintiff claims under a patent, issued in June, 1862, as of swamp and overflowed lands. The defendant claims the right of pre-emption, and alleges a settlement upon the land for that purpose in 1858. The plat of the survey of the township, including the land in controversy, does not appear to have been approved by the United States Surveyor-General until 1864. The verdict was for the plaintiff, and a new trial having been granted, the plaintiff appeals from the order.

The new trial was granted on the ground of errors in law occurring at the trial, and excepted to by the defendant. After the plaintiff had introduced in evidence, against the objection of the defendant, the patent from the State, and the approved plat of the survey, the defendant offered to prove by parol evidence that the land was not swamp and overflowed land; also, that at the time of issuing the patent the defendant occupied and still occupies the land in controversy, with his family; that he had gone on the land in good faith to pre-empt the same under the pre-emption laws of the United States; that he had fully complied with the requirements of such laws up to the present time; and that he was competent and qualified in every respect to pre-empt the land as public land of the United States. The plaintiff objected to the testimony on the ground that the patent and plat were conclusive evidence of the character of the land as against the defendant.

Neither party questions the authority of the case of *Kernan v. Griffith*, 27 Cal. 87, in which it is held that the question

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whether the title to any given tract of land inured to the State, by virtue of the Act of Congress of the 28th of September, 1850, was to be answered by ascertaining as a matter of fact whether, at the date of the passage of the Act, the land was "swamp and overflowed land" within the meaning of the Act, and that if it was proven to be such, then the title vested in the State. The plaintiff, while assenting to this doctrine, says that the patent from the State is conclusive against the defendant, because he has no title upon which he can defend and because he does not bring himself in privity with a common or paramount source of title, and because he asserts what the plaintiff denominates "a mere hypothetical equity, which he has neither averred nor proved."

What title from United States required to enable one to contest State patent.

There is no rule requiring that the defendant shall have a perfect legal title derived from the United States before he can question the validity of the title claimed under the State. It is simply necessary that there shall be a privity of title between him and the United States—that is, that he shall possess some right, title, interest or claim in or to the lands that is permitted by the laws of the United States, to be acquired before the final transmission of title, and which is recognized by those laws, as a valid subsisting right, though further acts may be necessary to be performed by both parties before the title finally passess from the United States to the claimant. A pre-emption claim will answer this description. In *Lyttle v. The State of Arkansas*, 9 How. 333, Mr. Justice McLean, in delivering the opinion of the Court, made use of this language, which has been so often quoted in discussions respecting pre-emption claims: "The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right. But when covered by the law it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it." (See also *Bernard's Heirs v. Ashley's Heirs*, 18 How.

43; *Garland v. Wynn*, 20 How. 6; *Terry v. Megerle*, 24 Cal. 610; *Kile v. Tubbs*, 23 Cal. 432.)

The seventh section of the Act of Congress of May 30th, 1862, provides "that in regard to settlements, which, by existing laws, are authorized in certain States and Territories upon unsurveyed lands, which privilege is hereby extended to California," the pre-emption claimant shall be required to file his declaratory statement, etc. Among other Acts authorizing a settlement upon, and the acquisition of the right of pre-emption to, unsurveyed land, is the Act of July 17th, 1854. (10 U. S. Statutes at large, p. 305; the Act of July 22d, 1854, Id. p. 310; and the Act of August 4th, Id. p. 575.)

The evidence offered by the defendant was a portion at least of that which was necessary, in order to bring him within the provisions of the Act of Congress of 1862, and show that he had acquired such a right of pre-emption to the lands in controversy, as could be held in the unsurveyed public lands.

Another ground of the motion for a new trial, was the alleged error in admitting in evidence the plat of the survey of the township, on which the lands in controversy were noted as swamp lands. It was offered as evidence to prove that the lands in controversy were swamp and overflowed lands. The opinion of the Court in granting a new trial not being before us, and there being nothing in the record indicating the grounds upon which the order was made, it is proper that this point should also be passed upon.

In offering in evidence the plat, reliance doubtless was placed mainly upon the surveyor's descriptive notes found upon the plat, indicating that the lands in controversy were swamp lands, but we will not undertake to say that such was the only manner that he intended to make the plat available as evidence.

Map of survey of swamp land as evidence.

The descriptive notes on the plat are not conclusive evidence of the character of the land, for when the bounds of a

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tract are given, the question whether the tract is or is not included within the lands granted as swamp and overflowed land, is a question of fact; and where the question arises, prior to the time when it is finally ascertained on behalf of the General Government and the State, what lands passed to the State under the grant, it must be determined as the same question would be, when involved in a controversy between private persons, respecting lands bearing no relation to the Act of Congress. (*Kernan v. Griffith, supra.*) Neither the laws of Congress, nor the statutes of this State, nor the instructions issued from the General Land Office, have constituted the plat as evidence between the General Government and the State, that the lands are or are not such lands as were granted by the Act of Congress to the State. It was designed for a very different purpose. It might properly be adopted, as it has been, by the General Government and several of the States, as evidence of the character of the lands, but until it is so adopted, it is not competent evidence to prove the fact in question.

The plaintiff, however, in offering the plat did not limit the offer to the descriptive notes found thereon, and it becomes material to inquire whether it was not competent evidence, in connection with other evidence, to show that the title passed to the State, under the Act, though not sufficient by itself to show the character of the land.

Cases are liable to arise, as may readily be conceived, in which the survey would not only be admissible in evidence, but absolutely essential to a recovery upon the patent issued by the State, for swamp and overflowed land. The principle is advanced in *Summers v. Dickinson*, 9 Cal. 554, and affirmed in *Owens v. Jackson*, Id. 322, and *Kernan v. Griffith, supra*, that upon the passage of the Act of Congress of September 28th, 1850, the State became the absolute owner of all the swamp and overflowed lands within her limits that had not been disposed of, the Act itself operating as a full and perfect conveyance *in presenti*. The truth of the proposition, as a general proposition, and when applied to the larger portion of the

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swamp and overflowed lands, is not questioned, but some modification of the general rule will be required when its application is sought in respect to certain portions of those lands, situated adjacent to the line dividing such lands from the dry lands. Those cases, perhaps, did not require any particular notice to be taken of the third section of the Act of Congress, which is as follows: "That in making out a list and plats, of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in the said list and plats; but where the greater part of any subdivision is not of that character, the whole of it shall be excluded therefrom." This section must be read in connection with the first section, in order to ascertain the lands intended to be granted. A patent is required by the second section to be issued by the General Government to the State, at the request of the Governor, for all the lands granted; and for that purpose the Secretary of the Interior is required to make out a list of the lands described in the first section. No provision is made in the Act for the issuing of a patent for any lands not included in the list. The lands granted must be identical with those required to be included in the list, and for which the patent is to be issued. The third section amounts in some respects to a limitation upon the general terms of the first section, and constitutes a more accurate designation of the lands granted. The legal subdivisions mentioned are the subdivisions made under the authority of Congress alone. The smallest subdivisions, under the Congressional system, are quarter-quarter sections, or forty acre lots, unless a fractional quarter section is subdivided, when the subdivisions may be smaller than forty acre lots, and different in their general form. It is to these smallest subdivisions that reference is made in section three, and if the greater part of any such subdivision is wet and unfit for cultivation, it vests in the State. This is the obvious meaning of the term "legal subdivisions," as employed in that section, and this construction is given to it by the Department of the Interior, as appears by the rules and instructions issued soon after the

passage of the Act, as well as at a late date. (See Lester's Land Laws, 543, 551.) Where the whole of a township, section, or subdivision of a section is of the character embraced in the grant, the title of course passed to the State. (Id. 544.)

The first section, when read in connection with the third, which serves to limit and define the more general terms of the first, expresses a grant to the State of the legal subdivisions of the public land, the greater part or all of which are wet and unfit for cultivation, and is not a grant of the swamp and overflowed land, without regard to legal subdivisions. In case the subdivision is intersected by the boundary of the swamp and overflowed land, the question whether such subdivision vested in the State, is solved by ascertaining, as a matter of fact, whether the greater part of such subdivision is swamp and overflowed land, or dry land. It thus appears that under the operation of the Act, dry land may be included, and swamp and overflowed may be excluded from the grant, and that where the land lies adjacent to the margin of swamp land, the title to any given parcel of swamp land does not vest in the State, unless it appears that it forms the larger part of a legal subdivision. It is in respect to legal subdivisions situated at the margin of the swamp and overflowed land that the general proposition announced in the cases above cited require this modification: that if the swamp and overflowed land—or, as it is expressed in section three, the land “wet and unfit for cultivation”—falling within any legal subdivision does not constitute the greater part of such subdivision, such portion of swamp and overflowed land is not included within the terms of the grant.

Where the lands are so situated, that they do not fall within a legal subdivision—according to the signification of that term as employed in section three—that might be intersected by the boundary line of the swamp and overflowed land, no practical question can be made as to their being included in the grant, or as to the Act operating as to them, as a grant *in presenti*; and a survey made under the authority of Congress would not seem to aid or in any manner ascertain the title of

the State; but when a parcel of swamp and overflowed lands does fall within a subdivision so situated, a survey may not only be proper but indispensable, as the only means of ascertaining whether the title to the given parcel, vested in the State by virtue of the Act of Congress.

Neither a private survey nor one made under the authority of the State will answer this purpose, but it must be made under the authority of the United States. Even after a principal meridian and a base line have been established, and the exterior lines of the townships have been surveyed, neither the sections nor their subdivisions can be said to have any existence, until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by the survey, but they are created, and although a surveyor may, in advance of the making of the subdivision of the township, by the Deputy of the United States Surveyor-General, run lines with the greatest practicable exactness from the corners established on the exterior lines of the township, to ascertain the bounds of any given quarter-quarter section, still when the survey comes to be made under the direction of the Surveyor-General, the difference between the two surveys may be such that the forty acre lot, which, under the private and theoretically the more accurate survey, appeared to fall within the lands listed to the State, will be excluded from the list, or *vice versa*.

The plat of the survey of the township was admissible in evidence, for the purpose of showing the lines of the subdivisions including the lands in controversy, but not for the purpose of proving by the surveyor's descriptive notes found upon the plat, that those subdivisions are swamp and overflowed lands.

Order granting a new trial affirmed.

Statement of Facts.

T. O. BRUNN v. MARTIN MURPHY *et als.*

CASE AFFIRMED.—*O'Grady v. Barnhisel*, 23 Cal. 287, affirmed.

ASSESSMENT FOR TAXES.—An assessment of land for taxes to "Murphy and Dooley, and to all owners and claimants known or unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same," is good under the Revenue Act of 1854, as amended by the Acts of 1857 and 1859.

DESCRIPTION OF LAND SOLD IN TAX DEED.—If the description of the land assessed is definite and accurate in the assessment, and is inserted in the tax deed, and the purchaser at the sale buys a portion of it for the taxes and costs, such description in the tax deed of the portion sold as will enable its boundaries to be determined by extrinsic evidence, applying the description in the deed to the land, is sufficient.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The property was assessed for the fiscal year ending June 30th, A. D. 1862, at four thousand dollars, "to Murphy and Dooley, and to all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same." The assessment described the lot assessed as "commencing on the southwesterly corner of Herman and Mission streets; thence westerly on Herman street three hundred and eighty feet; thence southerly, parallel with Valencia street, five hundred and fifty feet, to Ridley street; thence easterly along Ridley street fifty-seven feet; thence north eight degrees twenty-five minutes east three hundred and five feet; thence south eighty-seven degrees fifty minutes east two hundred and fifty-six feet to west line of Mission street; thence northerly on Mission street three hundred and thirty feet, to the place of beginning."

At the sale, James A. Gauley was the bidder, who was willing to take the smallest portion of the lot and pay the taxes and costs; and the deed, after reciting the assessment, and that Gauley was the bidder who was willing to take the smallest portion of the lot and pay the taxes and costs, described the portion sold to him as "the lot of land commencing on the southwesterly corner of Herman and Mission streets; thence running westerly on Herman street twenty-five feet; thence

at right angles southerly to land assessed to Murphy and Doolley, and also to J. P. Holden; thence south eighty-seven degrees fifty minutes east to Mission street; thence northerly on Mission street three hundred and thirty feet, to the point of beginning." Plaintiff was the assignee of Gauley.

The other facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellant.

H. H. Haight, for Respondents.

By the Court, SAWYER, J.

This is an action to recover a tract of land in San Francisco. The plaintiff offered in evidence a tax deed executed upon a sale made for taxes for the fiscal year ending June 30th, 1861. Objection was made to its introduction on the ground that it was defective in numerous specified particulars required by the statute to be stated in a tax deed, and on other grounds. The objection was sustained, and the deed excluded. The plaintiff having no other title, judgment was rendered against him. A motion for a new trial having been made, and denied, plaintiff appeals from the order denying the motion, and from the judgment.

The only objections to the introduction of the tax deed worthy of consideration are those relating to its sufficiency under the statute. Since the trial of this case in the District Court, the case of *O'Grady v. Barnhisel*, 23 Cal. 287, has been finally decided on petition for rehearing, in which a deed differing somewhat in form and minor details, yet in all essential particulars similar to the one in question, was held to be sufficient. That case was twice thoroughly argued before our predecessors, and the judgment had the concurrence of four Justices, there having been a change in one of the members of the Court between the first and second decisions. We do not feel called upon to reinvestigate the questions determined in that case.

Assessment of property.

The motion for new trial, made since the decision in *O'Grady v. Barnhisel*, was denied on the authority of *Moss v. Shear*, 25 Cal. 38, upon the supposition that the tax for which the sale in question took place, was levied under section sixty-four of the Revenue Act of 1854, construed in that case. The learned Judge evidently overlooked one or two of the numerous amendments and changes in the revenue laws made since 1854. Section fifty-five of the Act of 1857 repeals in express terms "sections fifty-nine to sixty-six, inclusive * * * of an Act passed on the 15th of May, 1854, entitled 'An Act to provide revenues,'" etc. (Laws 1857, p. 344, Sec. 55.) The tax in question was, therefore, not levied under sections sixty-four and sixty-five of the Act of 1854, but under the Act of 1857, as further amended by the Act of 1859. Section three of the Act of 1857, as amended by section two of the Act of 1859, contains a provision designed to obviate the questions involved in *Moss v. Shear*, which provision is as follows: "Provided, all real estate and personal property shall be assessed to a person, firm, corporation, association or company, as herein provided, if any owner or claimant shall be known to the Assessor, and to all owners and claimants of any interest, present or future therein, or any lien upon the same, and no error in regard to such owner or claimant shall in anywise affect the validity of such assessment." (Laws 1859, p. 346, Sec. 2.)

And to carry out this idea, and as a still further guard against an escape through a defective assessment even under this stringent provision, section twenty-three was also amended so as to read as follows: "The matters directed by section eighteen to be substantially recited in the tax certificate, and by section twenty-two in the deed, shall be deemed, and they are hereby declared to be, all the requisites essential to the validity of sales made for taxes — and a deed, made in conformity with the requirements of section twenty-two, shall convey to the grantee the absolute title to the lands described in said

deed, and free, and clear of all encumbrances, * * * whatever, *whether said land was taxed to such person or persons, corporation or corporations, by name, or not,*" etc. (Ib. 349.)

It would seem, that, if there is any possibility of obviating by means of human language the force of appellant's criticisms upon the assessment "to Murphy and Dooley, and to other known and unknown owners and claimants," the Legislature has accomplished it in these provisions. If not, that body may well despair of accomplishing the desired result, and Assessors may also despair of ever making an assessment that will stand the test of judicial scrutiny.

Description in tax deed.

A point is also made, as to the sufficiency of the description in the deed. It is claimed to be void for uncertainty. The description complained of is not the one contained in the assessment roll, which is also introduced into the deed. The description of the property assessed is apparently accurate and definite. But one side of the part sold is said to be indefinite, as it is bounded on that side by lands assessed to other parties. The starting point is fixed with precision, and the length and direction of the first line given. The second line runs "thence at right angles southerly to land assessed to Murphy and Dooley, and also to J. P. Holden." It must be presumed that the parties understood at the time of the bidding what lands were then designated as being assessed to Murphy and Dooley, etc., and the description may be applied to the land sold, if necessary, by extrinsic evidence. Whether this description would have been sufficient or not for the purposes of an assessment, we think it *prima facie* sufficient for the purpose of indicating the portion of the land sold, which had already been properly assessed.

We think the Court erred in excluding the deed.

Judgment reversed and new trial ordered.

Mr. Justice CURREY and Mr. Justice RHODES dissented.

Statement of Facts.

HORACE W. CARPENTIER v. WILLIAM MITCHELL, ERASTUS FORD, JOHN M. JONES, JAMES W. MAXCY, MICHEL COHEN, GEO. ENGLEMEYER, MORRIS KLINE, THOMAS JOHNSON, C. VON WAGENER, S. D. PERKINS, DANIEL SEELY, JAMES FOSTER, GEORGE STONE, AND HENRY HOFFMAN.

DAMAGES FOR AN OUSTER BY A CO-TENANT.—A tenant in common when ousted by his co-tenant may recover the damages resulting from the ouster as well as when ousted by an entire stranger to the land.

DAMAGES RECOVERABLE FROM TIME OF OUSTER.—In an action to recover the possession of land by a tenant in common against a co-tenant, the plaintiff can recover damages only from the time of the actual ouster proved.

DAMAGES IN EJECTMENT.—In an action to recover the possession of land by the owner of an undivided one half, against defendants who entered as naked trespassers, but purchased an undivided interest after the commencement of the action, plaintiff can recover the value of one half the rents and profits, including those resulting from the improvements placed on the land by defendants, during the period of wrongful possession.

SETTING OFF VALUE OF IMPROVEMENTS AGAINST DAMAGES.—Where one who enters as a naked trespasser places improvements on the land, and afterwards buys an undivided interest, in an action against him to recover possession of the land by a tenant in common who owned prior to the wrongful entry the defendant cannot set off the value of his improvements against the damages.

LIMITATION OF TIME TO RECOVER RENTS AND PROFITS.—In an action to recover lands, the plaintiff can recover the rents and profits for three years only prior to the commencement of the action, if the defendant pleads the Statute of Limitations.

APPEAL from the District Court, Fifteenth Judicial District, Contra Costa County.

This was an action to recover possession of a tract of land in Contra Costa County, containing five hundred acres. On the 1st day of September, 1858, the plaintiff was the owner in fee and seized in law of an undivided one half of the tract. The action was commenced on the 22d day of December, 1862. The defendants were in possession of and occupying exclusively separate parcels of the tract. On the 15th day of January, 1860, the defendant Perkins, and on the 15th day of November, 1862, the defendant Johnson, and on the 2d day of September, 1858, all the other defendants, entered upon

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and took possession of the several portions of the premises occupied by each, and ousted the plaintiff therefrom. The defendants, by purchase from co-tenants of plaintiff, acquired small undivided interests in the land, varying from one eightieth to one nine thousand eight hundred and fortieth part each, at the following dates: Defendant Jones, March 9th, 1860; Mitchell, May 7th, 1860; Ford, March 27th, 1860; Cohen, January 28th, 1862; Englemeyer, August 11th, 1862; and all the other defendants after the commencement of the action and before the filing of their several answers. .

On the 19th of December, 1862, plaintiff demanded of all the defendants, except Seely, Perkins, and Foster, to be let into possession along with them, which demand the defendants refused to comply with. Prior to January 1st, 1860, but before any of the defendants acquired any right, title, or interest in the land or any part thereof, they erected upon the portions of the premises severally occupied by them fences and buildings, by way of improvements, of considerable value, but made no improvements after the acquisition of their respective titles.

The Court gave plaintiff judgment against each defendant, except Perkins and Johnson, for one half the value of the rents and profits, without any deduction for improvements, or the increased value of rents and profits caused by improvements, from the 2d day of September, 1858, to the 26th day of September, 1864, the day of the entry of judgment. Against Perkins and Johnson the value of one half the rents and profits was allowed from the time of their respective entries, January 15th, 1860, and November 15th, 1862.

The judgment, as modified by the Court, only allows rents and profits from December 22d, 1859, three years before the commencement of the action. Defendants appealed.

Thomas A. Brown, for Appellants.

One tenant in common who has been actually ousted and excluded from the common property by his co-tenant, may bring his action of ejectment to be restored to his possession

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of his share, but damages cannot be recovered in such action for rents and profits, or for use and occupation of the common property. (Title 20, Sec. 9, Greenleaf's Cruise.)

If, however, damages can be recovered in this action by one tenant in common against his co-tenant, such recovery can only be had for damages which occurred after the occupying tenant shall have refused upon demand made to permit his co-tenant to occupy with him the common property, and not until after the occupying tenant has actually ousted his companion from the common property, and for such time only as the property may have been *tortiously* holden by the tenant in possession. (Title 20, Secs. 9 to 14, Greenleaf's Cruise, and note bottom Sec. 14.)

Any one of the co-tenants may occupy the common property, and such occupation will be deemed to be lawful and rightful, and in support of the common title of all the co-tenants until after demand by the co-tenant out of possession to be let into possession, and the refusal of the occupying tenant, or such acts on his part as would make his subsequent holding possession adverse and *tortious*. (Adams on Ejectment, with notes by Waterman, p. 136, notes; *Pico v. Columbet*, 12 Cal. 415, and cases cited in the opinion.)

One tenant in common cannot recover against his co-tenant for use and occupation, or for rents and profits of the common property resulting from improvements placed on the property by the tenant in possession. (*Jackson v. Loomis*, 4 Cowen, 171; *Moore v. Cable*, 1 John's Ch. R. 387.)

In making partition of land between tenants in common, it is the universal rule in Courts of equity to set off the land on which improvements have been erected to the tenants who made them, and the value of such improvements are never taken into account as part of the common property, and this without reference to the time when the parties became tenants in common. (1 Gillman, 39; 13 Johnson, 116; *Lee v. Fox*, 7 Dana, 176.)

H. W. Carpentier, for Respondent, *in pro. per.*, upon the question of the right of a tenant in common, ousted by a co-tenant, to recover mesne profits, cited *Goodtitle v. Toombs*, 3 Wilson, 118; Sedg. on Dam. 122; *Carpentier v. Williamson*, 24 Cal. 609; *Sigler v. Van Riper*, 10 Wend. 420; and *Panton v. Holland*, 17 John. 99.

By the Court, SAWYER, J.

The principal questions in this case are determined in *Carpentier v. Webster*, 27 Cal. 524, and *Carpentier v. Mendenhall*, 28 Cal. 484. In this case the Court found an ouster by a portion of the defendants on the 19th of December, 1862, at the time of the demand by plaintiff to be let into possession, and refusal by such defendants—and by the other defendants at an earlier day; and we think the evidence on this point sufficient to justify the finding. In *Carpentier v. Mendenhall*, the jury only found the evidence which tended to show an ouster without finding the fact of ouster. Although the evidence as to some of the defendants in the two cases was substantially the same, in this particular, the findings differ.

Damages for ouster by co-tenant.

We see no reason why a party who has been ousted by his co-tenant should not recover the damages resulting from such ouster, as well as when ousted by an entire stranger to the land. His injury is no less because it was done by a co-tenant. No case cited is to the effect that he is not entitled to recover his damages, while numerous authorities show that he is; and such is our opinion. "The right to recover the mesne profits follows in all cases upon a recovery in ejectment." (Sedg. on Dam. 123.) "A tenant in common who has recovered in ejectment may maintain an action for mesne profits against his companion." (Ad. on Eject. Waterman's edition, 449; *Goodtitle v. Toombs*, 3 Wilson, 118; *Langendyck v. Burhans*, 11 John. 461; *Camp v. Homesley*, 11 Iredell, 212; *Hare v. Fury*, 3 Yeates, 13.)

In the cases of defendants Jones, Mitchell, Ford, Cohen and Englemeyer, the only ouster upon which plaintiff could recover at the time of the institution of this suit, was that of December 19th, 1862—their possession being rightful from the time they respectively became tenants in common until the ouster on that day. And the only damages, which the plaintiff is entitled to recover in this action, are such as grow out of, and are incident to the ouster upon which the recovery rests. (*Carpentier v. Mendenhall.*) The judgment as to these defendants is, therefore, erroneous to the extent of the rents and profits allowed, which accrued prior to December 19th, 1862.

The other defendants were naked trespassers, and in the wrongful possession of the premises from the time of their respective entries till after the commencement of this suit, and plaintiff is entitled to recover one half the rents and profits during the entire period of the continuance of such wrongful possession within the Statute of Limitations.

Improvements made on land by a trespasser.

The improvements made by the several defendants on the premises were all found by the Court to have been made “before any of the said defendants acquired any right, title or interest in the said demanded premises, or any part thereof, as tenants in common with the plaintiffs or otherwise, and whilst they were trespassers thereon and without color of title.” The defendants, therefore, were not, when said improvements were made, “holding under cover [color] of title adversely to the claims of the plaintiff in good faith,” and are not entitled to set off the value of such improvements against the damages claimed under section two hundred and fifty-seven of the Practice Act.

Admitting, for the purposes of this decision, that a tenant in common who has been ousted by his co-tenant, cannot recover the increased amount of the value of the rents and profits arising from valuable permanent improvements put upon the premises by such co-tenant, the defendants in this action are

not in a position to avail themselves of the principle, for the reason that the improvements were not made by them in the character of co-tenants. They were made by them while naked trespassers, and thus the improvements became a part of the land, and the property of those who held the title. The fact that the defendants subsequently purchased in and became co-tenants of the plaintiff does not in any respect change their relation to the title of that portion of the land held by the plaintiff. There was no error in allowing the value of the land in its improved state.

It is claimed by a portion of the defendants, that Court erred in allowing so much of the rents and profits as accrued prior to December 22d, 1859 — more than three years prior to the commencement of this suit — on the ground that such portion of the claim is barred by the Statute of Limitations. The statute was set up, and the defendants rely upon section seventeen, clause two, which limits a recovery in “an action for trespass upon real property” to three years. No authority has been called to our attention upon the construction to be given to this provision by either party. Regarding section seven as applying to rents, there does not appear to us to be any conflict between its provisions and those of section seventeen. By section seven a party must have been seized, or possessed within five years, to enable him to maintain an action at all for mesne profits accrued even within three years.

Statute of Limitations as to rents and profits in ejectment.

The various Statutes of Limitations of the several States, and the English statute, contain provisions substantially the same as those in section seven and seventeen of ours, except that, in most of them, the period for commencing an action for “trespass upon real property” is six, instead of three, years. (See *Richardson v. Williamson*, 24 Cal. 301-4.) Adams says — doubtless having reference to these provisions: “If the plaintiff declare against the defendant for having taken the mesne profits for a longer period than six years before the action brought, the defendant may plead the Statute of Limi-

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tations, namely, not guilty within six years before the commencement of the suit, and thereby protect himself from all but six years." (Ad. on Eject., by Waterman, 452.) And Buller, in relation to the same matter, says: "Certainly the defendant may plead the Statute of Limitations, and by that means protect himself from all but the six last years." (Buller's *Nisi Prius*, 88.) These are the only authorities upon the subject which have fallen under our notice. Accepting them as correct, it follows that, as to those defendant, who ousted the plaintiff on the 2d of September, 1858, the Court erred in allowing the rents and profits which accrued prior to November 22d, 1859. The findings of the Court furnish the elements necessary to enable us to direct a proper modification of the judgment.

As to the defendants Perkins and Johnson, the judgment and order denying new trial are affirmed.

As to the defendants Jones, Mitchell, Ford, Cohen and Englemeyer, the judgment must be so modified that the plaintiff shall only recover against them respectively the sum of two dollars per acre per annum upon the number of acres found by the Court to have been occupied by them respectively, from the 19th day of December, 1862, the date of the ouster, to the date of the order for judgment, September 26th, 1864.

And as to all the other defendants, the judgment must be so modified that the plaintiff shall only recover against them respectively the rents and profits at the monthly value of the premises occupied by them respectively, as found by the Court, from December 22d, 1859, to the date of the order for judgment, September 26th, 1864. And the District Court, upon the filing of the remittitur, is directed to modify the judgment accordingly.

And it is further ordered, that the respondent pay the costs of the appeal.

Points decided.

SAMUEL A. MORRISON *et al.* v. JAMES BOWMAN *et al.*

WIFE'S INTEREST IN THE COMMON PROPERTY.—Upon the death of the husband, the wife is entitled to half the common property, subject to the payment of the debts of the community.

LAST WILL AND TESTAMENT OF HUSBAND.—The husband has not the power by a last will and testament to dispose of the wife's interest and estate in the common property.

ELECTION OF WIFE TO TAKE UNDER HER HUSBAND'S WILL—ITS EFFECT.—If the husband, by his will, undertakes to dispose of the wife's half of the common property, as well as his own, to her and others, and she elects to accept the benefits intended and provided for her by the will, she thereby becomes divested of her title in and to the undivided half of the common property, provided an assertion of her community right and interest would necessarily defeat the objects of the will.

IDEM.—If, by a just construction of the will, it appears that the testator did not intend to dispose of his wife's share of the common property, her acceptance of a bequest or devise under the will will not operate as an election to relinquish her right to one half of the common property.

ACCEPTANCE OF BENEFITS UNDER THE WILL IS A CONFIRMATION OF IT.—Though a testator has not the power to dispose of the property of another person by his will, still if he undertakes so to do, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the testamentary dispositions of the testator.

DEED MADE BY AN ATTORNEY OR AGENT.—*Held*, that a deed purporting in the body of it to be the deed of Stephen Smith, but signed "Stephen Henry Smith, attorney in fact of Stephen Smith," is not the deed of Stephen Smith, even though the person describing himself as attorney in fact of Stephen Smith had authority to execute a deed of conveyance of the premises described for and in the name of Stephen Smith.

ATTORNEY IN FACT AND PRINCIPAL.—A deed for land, executed by an attorney in fact for his principal, must be executed in the name of the principal, otherwise nothing will pass by the deed.

REIMBURSEMENT OF ADVANCES MADE BY ONE ACTING AS TRUSTEE.—Where one supposed he had acquired the legal title to land in trust for certain devisees under a will, and under that belief, in discharge of his supposed trust, paid off encumbrances existing on the land, and expended money necessary for its preservation, *held*, that he was entitled to be reimbursed what he had so paid, with interest, notwithstanding he had not in fact acquired the legal title to the land.

DEED OF EXECUTOR, WHO IS ALSO AN HEIR, DEVISEE, AND LEGATEE.—A deed of conveyance by an executor of land belonging to the estate, in which he himself has an interest, purporting to convey in his individual capacity and also as executor, passes to the grantee his individual interest, but not the rights and interests of the heirs therein, which the executor had no authority, under the will, to convey.

SETTING ASIDE A DECREE OF FORECLOSURE AND DEED MADE THEREUNDER.—If a testator has mortgaged land devised by his will, and after his death, one who erroneously supposed he had acquired the legal title before the death

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of the testator buys in the property under the mortgage sale and acquires the legal title, which by his own election and the election of the devisees he holds in trust for them, a Court of equity will not set aside the decree of foreclosure and deed made thereunder.

SALES BY TRUSTEE OF PORTIONS OF TRUST ESTATE.—If one who holds the legal title in trust for devisees under a will, makes advances to pay encumbrances on the trust estate, and then sells portions of the property, a Court of equity in taking an account will confirm the sales and charge the trustee with the proceeds.

JUDGMENT SHOULD CORRESPOND WITH THE RELIEF SOUGHT.—It is not the duty of the Court by its judgment to extend to a party a real or supposed benefit which he does not ask nor manifest a desire to obtain.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

Sidney L. Johnson, for Appellant, contended that as the "Blucher Rancho" was common property, the widow was entitled by law to one half of it, and that a fair construction of the will did not manifest an intention on the part of the testator to exclude the widow of her community right, and that therefore the widow did not by her acceptance of the devise to her in the will divest herself of her half of the rancho, and that her deed of release to the appellant vested in him the title to her half.

In support of his construction of the will he cited *Hall v. Hall*, 2 McCord's Ch. R. 269; 8 Paige, 323; *Adsit v. Adsit*, 2 John. Ch. 448; *Wake v. Wake*, 1 Vesey, Jr. 335; Meiggs' Tenn. R. 378; *Parker v. Parker*, 10 Texas, 83; *Gibson v. Gibson*, 17 Eng. Law and Eq. Rep. 353; *Havens v. Sackett et al.*, 15 N. Y. 365; and *Havens v. Havens*, 1 Sand. Ch. R. 324.

D. O. Shattuck, for Respondents.

Edmond L. Gould, also for Respondents, contended that by his will the husband assumed ownership over the whole of the community property, and intended to give it all away, and that as by his will he left a third of his separate estate to his widow, she was put to her election, and having accepted the bequest, is forbidden to disappoint the will by demanding half the community, and cited 2 Williams on Ex. 1,263; 2

Story's Equity Jur., Sec. 1,076; *Ritter v. McLean*, 4 Ves. 531; *Whistler v. Webster*, 2 Ves. Jr. 371; *Blake v. Bunbury*, 1 Ves. 523; 4 Bro. C. C. 21; *Finch v. Finch*, 1 Ves. 534; *Wilson v. Mount*, 3 Ves. 191; 1 Jarman on Wills, [*384]; *Hyde v. Baldwin*, 17 Pick. 303; 6 Dow, 149; 4 Ves. 531; 2 Ves. 693; *Druce v. Denison*, 6 Ves. 385; *Miall v. Brain*, 4 Madd. 119; *Shuttleworth v. Greaves*, 4 Mylne & Craig, 35; and *Reaves v. Garrett*, 34 Ala. 558.

By the Court, CURREY, J.

Stephen Smith, of Bodega, in Sonoma County, died in November, 1855, possessed of a large estate, real and personal, in said county. In August, 1854, he made his last will and testament by which he undertook to make disposition of his property. At the time of his death he left surviving him his wife, Manuella T. Smith, who was the mother of three of his children. He also left surviving him four other children, the offsprings of a former marriage. At the time of his death he owned the Bodega Rancho, consisting of eight leagues of land, and he and his wife owned the Blucher Rancho, consisting of six leagues, as common property. By his will, which was duly proved soon after his death, Stephen Smith devised and bequeathed to his wife Manuella his house and household furniture at Bodega, to have and to hold during her life; and also he devised and bequeathed to her one third of the Bodega Rancho, and one third of his stock of cattle, etc., except the portion thereof which might be applied to the payment of his debts and funeral expenses, to have and to hold during her life, with remainder to his children born of her, in fee, share and share alike; and to the children last mentioned, he devised in fee the other two thirds of the Bodega Rancho, share and share alike, with the proviso that if any of such children died without issue, that in such event, the share or shares of such deceased child or children, should descend to and be inherited by the brothers and sisters of such deceased child or children of the full blood, to the exclusion of those of the half blood.

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The testator devised to Stephen Henry Smith, his son by his former wife, a half league of the Blucher Rancho in fee, and to Giles Smith, also his son by his former wife, and to Ellen Morrison and Elvira Pond, his daughters by his former wife, each a life estate in a half league of the Blucher Rancho, with remainders over in fee. And to his grandchildren, born in lawful wedlock who should be living at the time of his death, the testator devised in fee, share and share alike, one league of the Blucher Rancho. After thus providing for the children by his former wife, the testator declared, in the tenth clause of his will, that he had, as he believed, still left and undisposed of "by the foregoing provisions of this will, three square leagues of land, part and parcel of my Blucher Rancho." He then declared that it was his design to sell and dispose of the same or portions thereof during his lifetime for the purpose of raising means to pay and discharge his subsisting debts and liabilities; but in the event that he should not sell and dispose of such three leagues, he directed his executors to sell and dispose of the same, or the portion thereof which should remain unsold at the time of his death, and after the payment of his debts, funeral expenses and the expenses of the settlement of the estate, to divide the proceeds arising from such sale as follows: one third to his wife Manuella, and the other two thirds equally among all his children living at the time of his decease; providing, however, that if any of his children should die before the testator, leaving a child or children, then such child or children should take by representation the share to which the parent would have been entitled if he or she had survived the testator. In connection with his direction as to the distribution of the residue of the proceeds arising from the sale of these three leagues, the testator expressly ordered and directed his executors to require, demand and collect from his children, Stephen Henry Smith, Giles Smith, Ellen Morrison and her husband, and Elvira Pond and her husband, the repayment to his estate of all sums of money by him advanced for them or on their account, and all sums due him for goods and chattels sold to them or either of them,

excepting any advances made on account of his daughters for their education and support before their marriage.

Early in November, 1855, Stephen Smith was stricken down with paralysis, and died on the 16th of that month, at the house of the appellant, in San Francisco. One week previous to his death his son, Stephen Henry Smith, who, it appears, was the attorney in fact of his father, appointed by an instrument in writing, under seal, in 1849, attempted to convey to C. B. Polhemus the Blucher Rancho. The deed executed by Stephen Henry Smith was in form the deed of Stephen Smith from the beginning to the end of the *testamonium* clause, but it was signed "Stephen Henry Smith, attorney in fact of Stephen Smith." The consideration expressed in this deed was seven thousand five hundred dollars. On the 11th of January, 1856, Polhemus undertook to convey by deed the property to Bowman, the appellant. The consideration expressed in the deed was one dollar. At the time the deed was executed by Stephen Henry Smith to Polhemus, Stephen Henry resided with Bowman, who was his brother-in-law, and the transaction of the conveyance on the one part, and the purchase on the other, was managed by Stephen Henry and the appellant. Stephen Smith was not consulted respecting the matter, though the deed was executed in the house where he lay sick; nor does it appear that any portion of the consideration price expressed in the deed was in fact paid, though Polhemus and Bowman were examined as witnesses on the subject. At this time there was a mortgage on the Blucher Rancho, dated the 2d of February, 1855, for ten thousand dollars, bearing compound interest at the rate of three per cent per month, payable in advance, and also a mortgage on the Bodega Rancho, dated the 29th of May of the same year, for twelve thousand dollars, bearing the like rate of interest. These mortgages were executed by Stephen Smith.

From the testimony in the case, upon which both parties place reliance, it appears that in May, 1855, Stephen Smith spoke of selling the Bucher Rancho, and said he would have been willing to take for it thirty or thirty-five thousand dol-

lars, with which he could have paid his debts and dispensed with the loan he was then obtaining upon mortgage of the Bodega Rancho; and in October, previous to his death, he informed one of the witnesses that he had made arrangements with Polhemus to loan him enough to pay his debts, which he stated, according to the recollection of the witness, to be about thirty thousand dollars, and that he was to pay interest for the use of the money at the rate of one or one and a half per cent per month, and for this he was to execute a deed of the Blucher Rancho in trust, to be sold by the party from whom he was to obtain the money, who was to reimburse himself therefrom the amount due him.

The testator nominated his wife, Manuella T. Smith, executrix, and William A. Richardson and James Wilson executors of his last will and testament. Mrs. Smith became qualified as executrix. The executors named failed to do so.

In June, 1856, the executrix commenced an action in the District Court in Sonoma County against James Bowman, Stephen Henry Smith and C. B. Polhemus, for the purpose of setting aside the conveyance executed by Stephen Henry Smith to Polhemus. While that action was pending, in 1856, the owners of the mortgage on the Bodega Rancho obtained a decree in the Circuit Court of the United States foreclosing such mortgage. Before then, in March, Bowman had deposited with the holders of the demand secured by the mortgage on the Blucher Rancho the amount due thereon, leaving, however, the mortgage outstanding in the hands of the mortgagees, subject to his control and direction.

On the 7th of August, 1856, the executrix and Bowman compromised the action commenced in the District Court in Sonoma County. By this compromise Bowman executed to the executrix a bond in the sum of one hundred thousand dollars, with a condition thereunder written—first reciting the commencement of the action in Sonoma County against him and others to cancel the deed executed by Stephen Henry Smith on the 9th of November, 1855, and the deed executed by Polhemus to Bowman, and also reciting the existence of

the two mortgages mentioned, and further that the executrix had agreed to dismiss her action against him and others, and that he had agreed with her, in consideration of the premises, and of the dismissal of such action, and of the sum of five dollars to him paid, to hold and keep the estate of Stephen Smith, deceased, and said executrix free and clear of and from any claim or demand of Stephen Henry Smith, Ellen Morrison, Elvira Pond and Giles Smith, under or by virtue of the last will and testament of said Stephen Smith, deceased, or any claim or demand of any kind or description by them or either of them against said estate, and then concluding as follows: "Now if the said James Bowman shall well, truly and fully pay, satisfy and discharge the said mortgage deeds and each of them, and any and all costs and expenses made or incurred by the commencement of any and all suits heretofore brought or that are pending, or that may be hereafter commenced to foreclose the said mortgages, and keep and hold the estate of the said Stephen Smith, deceased, free and clear of any and all obligations on account of said mortgages, then and in that case this obligation shall be void, otherwise to be and remain in full force and effect." At the same time the executrix and Bowman entered into an agreement in writing, under seal, in which was recited the commencement of the action in Sonoma County, and its object and her agreement to dismiss it; in consideration of which followed a covenant on his part to pay, settle and satisfy Stephen Henry Smith, Ellen Morrison, Elvira Pond and Giles Smith for all claims and demands which they or either of them had or might thereafter have against the estate of their father under or by virtue of his last will and testament, and to pay the costs of such action. On her part the executrix agreed to dismiss her action against Bowman and others, and also to dismiss and discontinue an action which she had brought against Samuel Morrison and G. H. Pond, and to cancel all demands against the said Morrison and Pond.

On the 24th of October, 1856, Bowman paid twenty-one thousand five hundred and thirty seven dollars and fifty cents in discharge of the debt secured by the mortgage on the

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Bodega Rancho. This being done, Manuella T. Smith, the widow of Stephen Smith, deceased, and the executrix of his estate, executed and delivered to Bowman, Polhemus and Stephen Henry Smith a deed bearing date the 4th of December, 1856, by which, for a valuable consideration received from them, she released and forever discharged them of and from all actions and causes of action, and of all debts and demands, and of all claim, demand, right and interest of, in and to the Blucher Rancho, which she individually or as executrix of the estate of Stephen Smith, deceased, had or might have in the same and every part and parcel thereof, and of all actions or causes of action which she individually as executrix aforesaid, or otherwise, could or might have against the said Bowman, Polhemus and Stephen Henry Smith by reason of any deed, matter or thing whatsoever, connected with the Blucher Rancho, or in any way affecting the title to the same, as vested at the time in them or either of them.

On the 24th of March, 1856, Bowman advanced to Pioche, Bayerque & Co., the owners and holders of the debt secured by the mortgage on the Blucher Rancho the sum due for principal and interest thereon, but received from such firm no formal assignment of the debt and mortgage. After this an action was commenced in the United States Circuit Court, in the name of Jules B. Bayerque as plaintiff, against Manuella T. Smith, executrix, etc., S. Henry Smith, Giles Smith, Samuel A. Morrison, and Ellen Morrison, his wife, and Elvira Pond as defendants, to foreclose the mortgage; and on the 25th of October, 1856, a decree of foreclosure was entered; and on the 9th of the following December the property, the Blucher Rancho, was sold under the decree to the plaintiff Bayerque. On the 20th of May, 1857, Bowman having fully settled with Bayerque, the latter assigned to him the certificate of the sale under the foreclosure. The officer who made the sale under the decree executed a deed for the premises to Bowman on the 10th of June, 1857. The sum claimed to have been paid by Bowman in discharge of the property from this mortgage amounted to twenty one thousand and eighty-nine dollars.

The plaintiffs brought their action to have the deeds executed by Stephen Henry Smith to C. B. Polhemus, and by Polhemus to James Bowman set aside, and to have the mortgage on the Blucher Rancho declared as paid, satisfied and discharged, on the 24th of March, 1856, and that the decree of foreclosure and the sale and conveyance of the Blucher Rancho thereunder be decreed to be fraudulent and void. Or in case the Court should be of opinion that the decree of foreclosure and the conveyance made under and by virtue of it, should be held valid and effectual, that then the said Bowman might be decreed to hold the title to the property as trustee for the plaintiffs and the other heirs and legatees of Stephen Smith, deceased, and that an account should be taken, etc.

Bowman answered, controverting the charges of fraud contained in the complaint, but acknowledging that he held certain individual interests in the property in trust for the plaintiffs; but he averred that he had expended large sums of money for the benefit of their interests; that he was ready to account, and on being reimbursed, to convey to them their interests; and asking as a counter claim, that if they should refuse or neglect to pay him within a reasonable time to be fixed by the Court, the amount ascertained to be due him upon the accounting, then their interests should be decreed to be sold as on foreclosure, and that he be paid out of the proceeds of such sale; and he also prayed for such further or other relief in the premises as the nature and circumstances of the case might require.

Of the defendants, Bowman was the only one who answered. The cause was tried and an interlocutory decree pronounced by the Court, declaring the deed executed by Stephen Henry Smith to C. B. Polhemus, and the deed executed by Polhemus to Bowman, and the deed executed under the foreclosure decree to said Bowman, null and void. The Court also decreed the agreement entered into between Manuella T. Smith, executrix, etc., and the said Bowman, and her deed releasing to him her interest in the Blucher Rancho, to be null and void. The

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Court then directed a reference, for the purpose of taking and stating an account of the moneys received and disbursed by the defendant Bowman on account of the estate of Stephen Smith, deceased, and also directed the referee to report the proportionate share which each of the infant plaintiffs should pay of the disbursements necessarily expended for the protection of the Blucher Rancho. Accordingly, an account was taken and stated, and thereupon the Court rendered a final decree, directing the right, title and interest of the devisees under the will in and to the three leagues of the Blucher Rancho, which the testator had directed to be sold for the payment of his debts, to be sold by the Sheriff; and he was further directed, after paying the expenses of the action, to pay to the defendant Bowman the amount found due him, with legal interest thereon from the 1st of October, 1863, provided the proceeds of such sale were sufficient for the purpose; and the decree also provided the mode of making up any balance that might be due Bowman, in case the property so directed to be sold should be insufficient for the purpose.

From the several decrees in the case, and from an order refusing to grant a new trial, the defendant Bowman has appealed, and the principal ground of complaint which he makes is, that the District Court erred in holding and deciding that the appellant was not the owner of one half of the Blucher Rancho.

Right of husband to devise wife's half of common property, and effect of her acceptance under the devise.

The Blucher Rancho was the common property of Stephen Smith and his wife Manuella. When he died she was entitled to an undivided half of it, subject to the payment of the debts of the community. The husband had not the power to dispose of the wife's moiety by his last will and testament; and the only question now to be determined respecting her share and interest in the property is whether by accepting a devise and bequest under the will she elected to release and surrender her right to the half of the common property, and whether

by her acceptance of the donations under her husband's will she did in fact, by implication, divest herself of her title in and to the half of the Blucher Rancho.

Jarman, in his work on Wills, says: "That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him, must make good the testator's attempted disposition; but if on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." (1 Jar. on Wills, 385.) Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases when there is a clear intention of the person from whom he derives one, that he should not enjoy both. (Story's Eq. Jur. Sec. 1,075.) Judge Story says if a testator should devise an estate belonging to his son, or heir at law, to a third person, and should in the same will bequeath to his son or heir at law a legacy of one hundred thousand dollars, or should make him the residuary devisee of all his estate, real and personal, it would be manifest that the testator intended that the son or heir should not take both to the exclusion of the other devisee; and therefore, he says, he ought to be put to his election which he would take; that is, either relinquish his own estate or the bequest under the will. (Story's Eq. Jur. 1,076.) In *Blake v. Bunbury*, 4 Bro. C. Cas. 24, it is declared to be the settled doctrine of a Court of equity that no person shall disappoint the will under which he takes, and that if the testator gives to B. lands to which he has no title, and which are the estate and in the possession of A., to whom he gives by the same will other parts of his estate, A. must elect and convey his estate to B., or he cannot take the ben-

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efit under the will. It seems to be the established doctrine of Courts of equity in such cases, that a person cannot accept the benefit intended for him and at the same time reject the will by asserting, in opposition to it, his own inconsistent proprietary rights. The authorities are abundant sustaining this doctrine. (Story's Eq. Jur. Chap. 30, and notes and authorities, and 1 Jarman on Wills, Chap. 15, and notes and authorities.) In this connection let it be observed that we do not hold that acceptance by a wife of a devise or bequest from her husband would amount to an election to surrender her individual right in the common property, unless by a just construction of the will it appeared that it was the intention of the testator to make disposition of her share in the community property as well as of his own; or unless, where such intention is not manifest, her acceptance of the benefit conferred by the will could not subsist consistently with the dispositions made by the testator; for in the one case, if the testator's intention to affect her share of the common property by testamentary disposition be not apparent—or in the other, if her acceptance of his bounty be not repugnant to the provisions of the will, she might accept the donation without the surrender of her right to the half of the community estate. (*Fuller v. Yates*, 8 Paige, 328; *Sanford v. Jackson*, 10 Paige, 266; *Bull v. Church*, 5 Hill, 207; S. C. 2 Den. 430.)

The appellant's counsel insists that the testator could not dispose of his wife's interest in the common property by his last will and testament. He maintains that she could accept the donation made to her by the testator, and at the same time have and hold the half of the common property, notwithstanding the testator's disposition. To support his position the learned counsel relies on the cases *Beard v. Knox*, 5 Cal. 252, and *Payne v. Payne*, 18 Cal. 291. In the first of these cases the testator bequeathed to his wife five hundred dollars; and the residue of his estate, except some trifling legacies, he devised to his infant daughter. The plaintiff, widow of the testator, accepted the legacy, and at the same time claimed one half of the common property, and brought her action to

recover it, and had judgment. It was contended on the part of the defendant that by accepting the legacy the widow was estopped from setting up a claim to half the common estate. But the Court held otherwise, saying: "The deceased had no authority to dispose of but one half of the property. This he might do to whomsoever he pleased. The plaintiff does not contest that right, but only seeks to withdraw her own property from the operation of a conveyance which, it is claimed, has despoiled her of it. This she may do with the greatest propriety, as the legacy received by her was part of her husband's estate and not her own." In *Payne v. Payne* the Court referred to the case as *Beard v. Knox*, saying: "We have no doubt of its correctness; and we only affirm and follow it in holding as we do in the present case, that the plaintiff only took one undivided half of the common property in her own right, by virtue of the community existing between herself and husband; and that the remaining half was subject to his testamentary disposition." These cases do not disturb the doctrine of election as laid down in the authority to which we have above referred. The acceptance of the legacy by the widow, in *Beard v. Knox*, was not inconsistent with her claim to one half of the common property. From the record of that case, now on file in the office of the Clerk of this Court, it appears that the testator did not undertake to devise to his daughter anything more than his own interest and estate in the common property.

A testamentary provision in lieu of a devisee's or legatee's proprietary right, in order to render it such upon acceptance of it, must be declared in terms to be given in lieu of such right; or that intention must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to such proprietary right would be inconsistent with the will or so repugnant to its dispositions as to disturb and defeat them. (4 Kent's Com. 58; *Fuller v. Yates*, 8 Paige, 330.) In *Payne v. Payne* the doctrine of election was in no sense involved, and the Court did not say anything touching the point now in controversy.

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The case of *Theall v. Theall*, 7 La. R. 226, cited by appellant, sustains the doctrine that a wife entitled to half the *gananciales*, may accept a bequest under the will of her husband without thereby surrendering her proprietary right to half the community property. In that case the testator, after making several specific legacies to his collateral relatives, bequeathed to his wife certain designated personal property, and then gave of the remainder of his property one half to his wife and the other half to other persons. Mrs. Theall claimed that she was entitled to the specific legacy made to her, and to one half of the residue of her husband's property after payment of the specific legacies under the will, and also to one half of the community property in her own right; and the Court held that she was so entitled, on the ground that such was the testator's intention ascertained by reference to the language of his will. In the case here referred to the Court say a testator must be presumed to know that his own property only can be the subject of his disposition, and that he cannot dispose of the property of others. The case of *Theall* is in our judgment in consonance with other authorities which we have cited. Her acceptance of the specific and general bequests made to her was in no sense repugnant to the provisions of the will. The will in all its provisions could have complete effect, notwithstanding, and that too according to the apparent intent of the testator. The intention of the testator is to be kept in view as the pole star in the construction or interpretation of his will; and it is not to be presumed in the absence of a manifest intent on his part, that he designed to make disposition of any property not his own. But when it does so appear, and the owner of such property accepts a legacy or devise under the will, which acceptance necessarily operates to give effect to the will as an entire disposition by the testator, such acceptance must, by the conditions on which it is founded, be held to be a confirmation of the dispositions of the will. This results logically from the conditions involved, forbidding and rendering impracticable the contemporaneous assertion of claims, which cannot consist together in

support of the will. (*Gretton v. Haward*, 1 Swanst. 420-430, and the learned note of Swanston; *Sanford v. Jackson*, 10 Paige, 270.)

While it is the law that a testator can only dispose of his own property, he may assume to dispose of that which belongs to another, and such disposition may be ratified and confirmed by its owner, by the acceptance, under the will, of a donation, necessarily implying such ratification and confirmation. The act of the testator attempting to dispose of the property of another, and the act of the owner of such property in accepting the benefit provided for him by the testator, united, complete the disposition, which, without the act of confirmation, would be of no effect. That the testator attempted to deal with the Blucher Rancho as his own property, is evident from the language of his will in respect to it. He uses the language of a sole proprietor, as it would seem, *ex industria*. He speaks of it as "*my Blucher Rancho*" not less than five times in his will.

The widow having accepted the devises and bequests provided for her by the will, thereby made her election and confirmed the disposition made by her husband of the common property; because to hold otherwise would so far frustrate and disappoint the objects and intentions of the testator as to deprive his children by his former marriage, and their children, in a great measure, if not entirely, of the portion of the property which he evidently designed they should have.

In the tenth clause of the will the testator declared his intention to dispose of the three leagues of the Blucher Rancho, not specifically devised, or so much thereof as might be necessary for the purpose of raising means for the payment of debts and liabilities subsisting against him; but anticipating that he might not accomplish this object during his life, he directed his executrix and executors, in that event, to carry into effect his design. He thus appointed and charged these three leagues of land for the especial purpose of paying, not only the debt secured by mortgage on the Blucher Rancho, but also that secured by mortgage on the Bodega property, as

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well as all other debts which he might owe at the time of his death; and also the expenses of his funeral and of the settlement of his estate. By this means he provided to relieve the Bodega property, which he gave to his wife and her children, of the encumbrance upon it; and further provided that of the proceeds of the sale of the three leagues appropriated for the payment of his debts which might thereafter remain, his wife should have one third and his children living at the time of his death the other two thirds. That the testator intended the entire Blucher Rancho should be devoted to the objects expressed in his will, we think there can be no rational doubt.

Deed by an attorney in fact must be signed with principal's name.

The deed executed by Stephen Henry Smith to Polhemus was not the deed of Stephen Smith. Stephen Henry Smith signed it with the description "Attorney in fact of Stephen Smith," appended to his name. This was not an execution of the deed in the name of his constituent and therefore was not, even if the transaction was honest and fair in its inception and attempted consummation, effectual to transfer the property therein described. So that notwithstanding this deed, the Blucher Rancho was the property of Stephen Smith and his wife on the day of his death. The added words: "Attorney in fact of Stephen Smith," are *descriptio personæ* merely of him who signed the deed. The fact that Stephen Henry Smith was the attorney of the person described in the deed as the grantor, and that he intended to bind his principal thereby, does not obviate the objection. It may be admitted that the attorney intended to bind his principal by the deed executed — but intention alone was not enough. The use of legal means for accomplishing the object were essential and indispensable to effect the transfer of the property. The rule is well established that when a person having power to sell and convey real estate for another, undertakes to exercise the power, the act performed must be in the name of the principal, or it will not bind him. (*Elwell v. Shaw*, 16 Mass. 42;

Townsend v. Corning, 23 Wend. 439, and the cases therein cited.)

Right of one who believes himself a trustee to be reimbursed for advances made to trust estate.

The appellant supposed that he had acquired the title to the Blucher Rancho by means of the deeds executed by Stephen Henry Smith and Polhemus, and that he held the title so far as the plaintiffs were concerned, in trust for them, and he claims that whatever he did in the premises subsequent to that time, was in discharge of his duties as trustee to the extent of the interests of the plaintiffs and all others concerned in the property as beneficiaries under the will of Stephen Smith. He accordingly paid the sums due and secured by the two mortgages mentioned, and adopted means for the preservation of the property and for securing the confirmation of the title. For these advancements the decree of the Court below justly provides he shall be paid.

By the decree of foreclosure of the mortgage on the Blucher Rancho and the sale of the premises thereunder and the conveyance finally executed to the appellant, he became invested with the legal title to the property. Before then, on the 4th of December, 1856, Manuella T. Smith had by deed remised, released and forever discharged the appellant, and Polhemus, and Stephen Henry Smith, of and from all actions, causes of action, claim, interest, right or demand which she individually or as executrix could or might legally or equitably have, of, in, and to the Blucher Rancho, and every part and parcel thereof; and also of and from all actions and causes of action which she individually or as executrix or otherwise should or might have against them by reason of any deed, matter or thing whatsoever connected with the Blucher Rancho, or in any way affecting the title to the same, as then vested and existing in them, or either of them.

It is not claimed that the relation of trustee and *cestui que trust* subsisted between the appellant and Mrs. Smith after the

execution of this deed of release, if in fact it existed before then. In consideration of the covenant on the part of Bowman to pay the debts of the estate and to indemnify it and herself against liabilities, she seems to have been willing to release and surrender her rights and interests therein, and undertook to do so by the deed of release of December, 1856. This release, we think, had the effect to transfer to Bowman, Polhemus, and Stephen Henry Smith her residuary interest in and share of the three leagues of land appointed for the payment of the testator's debts and liabilities, as specified or indicated in the tenth clause of the will. This deed of release could not operate to divest the rights of the children of Stephen Smith to the two thirds of the residuum of these three leagues of land, but it operated to transfer to Bowman, Polhemus, and Stephen Henry Smith the interest of the person who executed it in the contingent surplus of the proceeds which might arise from the sale of the three leagues appointed and appropriated for the payment and discharge of debts and liabilities. We see no reason for setting aside the decree of foreclosure of the mortgage on the Blucher Rancho, nor the sale and conveyance made by virtue thereof, which became consummate in the transfer of the title of the persons who were defendants in that action, to the appellant, who by reason of the circumstances and of his own election and that of the parties interested under the will, had become and thus remained their trustee, holding the legal title to the property for their benefit; nor do we discover any reason for declaring null and void the bond executed by Bowman and the compromise entered into and the release executed by Mrs. Smith. She does not ask to have the same so declared and decreed, and it was not the duty of the Court to extend to her a real or supposed benefit that she manifested no desire to obtain.

Neither party has objected to the account as taken and stated, nor to the mode of making up any deficiency that might possibly remain to be paid to Bowman after exhausting the residue of the three appointed leagues for the purposes designated by the tenth clause of the will. By the account

stated, Bowman made sales of portions of the Blucher Rancho, amounting to two thousand four hundred and sixty-three and a half acres, for which he is charged in the account with thirty-one thousand one hundred and thirty-seven dollars and seventy-three cents. These sales were properly allowed by the Court below to stand as valid.

The appellant objects to the rate of interest — ten per cent per annum — allowed to him on the principal sums due him, for advancements made in discharge of debts in his capacity of trustee, and otherwise for the payment of moneys necessarily expended by him for the protection and preservation of the estate. He claims that such rate of interest will not indemnify him for his outlay, and insists that he is entitled in equity to a higher rate of interest, and that it is competent for the Court to afford him indemnity in this particular. Under the circumstances of the case we are not disposed to change the decree of the District Court in this respect. It is highly probable he will be well compensated for all advancements made by him in the performance of his voluntarily assumed trust. If the remaining portion of the three appointed leagues bring upon sale as much in proportion as did the land already sold by him, there will be a surplus remaining after he shall have been paid as provided by the decree in this case, and of that surplus he will be entitled in his own right to one third, while the children of the testator will be entitled to the other two thirds of it.

Having thus ascertained and determined the rights of the respective parties, it is now adjudged and decreed that so much of the judgment and decree of the Court below entered on the 19th day of October, 1860, as holds, adjudges and decrees that the agreement entered into on the 7th of August, 1856, between Manuella T. Smith, executrix of the last will and testament of Stephen Smith, deceased, and the defendant Bowman, and the bond executed on the same day by said Bowman to the said Manuella T. Smith, executrix, etc., to be null and void, and of no effect, be and the same is hereby reversed.

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And it is further adjudged and decreed that so much of the said judgment and decree of the Court below as holds, adjudges and decrees that the release executed on the 4th of December, 1856, by Manuella T. Smith, in her own right and also as executrix, etc., to said Bowman, Polhemus, and Stephen Henry Smith, to be null and void and of no effect, be and the same is hereby reversed.

And it is further adjudged and decreed that so much of said judgment and decree of the Court below as holds, adjudges and decrees that the deed executed on the 10th day of June, 1857, to said Bowman under the decree of foreclosure of the mortgage on the Blucher Rancho, and of the sale of said rancho, to be null and void and of no effect, be and the same is hereby reversed.

And it is further adjudged and decreed that as to the parts and portions of said judgment and decree entered on the 19th day of October, 1860, not reversed as above specified, be and the same is hereby affirmed.

And it is further adjudged and decreed that the judgment and decree of the Court below, made and entered on the 26th of December, 1863, be set aside, except as to the confirmation of the report of the referee, and in lieu thereof, that a judgment and decree be drawn up by the attorneys for the parties and submitted to this Court, that the same may be settled as the judgment and decree to be entered in this action, at which time the judgment respecting costs will also be entered.

[NOTE.— The opinion in this case was delivered at the April term, 1865. The parties concerned subsequently settled the matters in controversy between them, and hence the judgment in form directed to be drawn up and submitted to the Court was not prepared.]

JANUARY TERM, 1866.

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JUSTICES
OF
THE SUPREME COURT
DURING THE TERM OF THESE REPORTS.

HON. JOHN CURREY.....	CHIEF JUSTICE.
HON. LORENZO SAWYER.....	} ASSOCIATE JUSTICES.
HON. AUGUSTUS L. RHODES..	
HON. OSCAR L. SHAFER.....	
HON. SILAS W. SANDERSON..	

OFFICERS OF THE COURT.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1866.

BENJAMIN F. MYERS v. REBECCA A. MOTT, ADMINISTRATOR OF THE ESTATE OF W. A. MOTT, DECEASED.

DEATH OF THE DEFENDANT DURING THE PENDENCY OF AN ACTION.—In an action to recover judgment on a promissory note, the suggestion of the death of the defendant, and the substitution of his administrator, and the continuance of the suit against him, subjects the proceedings to such rules of the Probate Act as are applicable to proceedings for the collection of claims against an estate of a deceased person.

JUDGMENT AGAINST AN ADMINISTRATOR.—Where the only cause of action is the indebtedness of the estate of the deceased to the plaintiff, a judgment *in personam* cannot be rendered against the administrator.

JUDGMENT AGAINST ADMINISTRATOR ENFORCING ATTACHMENT LIEN.—If the defendant dies after the service of summons and the levy of an attachment on his property, and before judgment, and the administrator is substituted, and the action continued against him, the Court cannot render a judgment enforcing the lien of the attachment by a sale of the attached property, and an application of the proceeds to the satisfaction of the demand.

ENFORCEMENT OF ATTACHMENT LIEN.—An attachment lien upon property can be enforced only by a sale of the attached property under execution.

DEATH OF DEFENDANT DESTROYS ATTACHMENT LIEN.—If the defendant die after the levy of an attachment upon his property, and before judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator, to be administered on in due course of administration.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The facts are stated in the opinion of the Court.

P. L. Edwards, for Appellant.

The attachment was dissolved by the death of the debtor. The statute creating the remedy is in derogation of the common law and must be strictly construed.

The whole policy of the law is to the effect that the property of a decedent should be distributed pro rata and according to *class*, and not *in invitum* as now sought.

The law expressly declares that "no sale of any property of an estate of a deceased person shall be valid unless made under an order of the Probate Court, except as otherwise provided in this or other Acts." (Belknap's Probate, Sec. 148.)

Upon the question of a dissolution of the attachment by the death of the defendant, Mr. Edwards cited *Pancost v. Washington*, 5 Cranch, 707; *Sweringen v. Administrators of Eberius*, 7 Mo. 421; *Harrison v. Rufus*, 13 Mo. 446; *Kennedy v. Raquet*, 1 Bay, 434; Sargent on Attachments, 136; 4 Dallas, 60; *Parsons v. Merrill*, 5 Met. 359; and Drake on Attachments, Secs. 433 to 435.

Charles A. Tuttle, for Respondent, upon the question of the enforcement of the lien by a sale of the attached property, cited *Thatcher v. Bancroft*, 14 Abbott's P. R. 248. He also argued that the Court having acquired jurisdiction before the death, the sixteenth section of the Practice Act, declaring that actions shall not abate by the death, came into play; that the action which was continued against the administrator was the action commenced against the intestate, and not the action contemplated by the one hundred and fortieth section of the Probate Act; that section one hundred and forty referred to actions commenced against the administrator, as was held in *Thatcher v. Bancroft*, where the Court did not have jurisdiction before death; that the continuation of the action against

Argument for Respondent.

the administrator after Mott's death, had the same effect as a continuation against a successor in interest of the defendant in property would have; that the judgment must be of any particular character lest the attachment lien be lost, was not required by any provision of the Practice Act; that the language of the Act was general.

"The plaintiff may have the property of the defendant attached as security for the satisfaction of *any judgment* that may be recovered." (Practice Act, Sec. 120.) "The property attached shall be retained by the sheriff to answer *any judgment* that may be recovered in the action." (Practice Act, Sec. 130.) "If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the attached property." (Practice Act, Sec. 132.) That there was evidently a mistake in the supposition that the Act anywhere required for this purpose that the judgment must be against the original defendant in the action. That the only judgments upon which executions were prohibited by the Probate Act, were those mentioned in the one hundred and fortieth section, and those were judgments in suits commenced against administrators, and not judgments in actions commenced and jurisdiction acquired before death, but continued against them; that the two hundred and tenth section of the Practice Act provided for executions in every conceivable case, and among others for executions against real or personal property in the hands of personal representatives, heirs, etc.; that section two hundred and seventeen provided that "all property and rights of property seized and held under attachment in the action shall be liable to execution." If liable to execution, was not the Court vested with the power to order one to be issued? He also cited *Conara v. The Atlantic Insurance Company*, 1 Peters, 386; 2 Cranch, 358; 3 Cranch, 73; 8 Cranch, 431; 2 Sandford, 528; 1 McLean, 95; 7 Peters, 464; and 7 Metcalf, 340, upon the question of a dissolution of the attachment by the death of the defendant.

By the Court, RHODES, J.

At the commencement of this action, which was brought upon several promissory notes, a writ of attachment was issued and levied upon certain real and personal property of the defendant. After the service of the summons and the attachment, but before the time for answering had expired, the defendant died intestate. His widow was appointed as administratrix of his estate, and upon his death being suggested, the action was continued against his administratrix. The notes were presented to the administratrix for allowance as claims against the estate, and were rejected; and, although she subsequently and before judgment indorsed her allowance on the notes, that will not affect the merits of the case, but would go only to a question of costs. The Court having denied the defendant's motion for a dissolution of the attachment, rendered judgment for the plaintiff, which was substantially as follows: That the plaintiff recover of the defendant the amount of the promissory notes, to be paid in the gold coin of the United States; that the Sheriff proceed to sell in like manner as under execution the personal property taken under the attachment; that if the personal property should be insufficient for the satisfaction of the judgment, he should in like manner proceed to sell the real property attached; that if the proceeds of such sales should be insufficient to satisfy the judgment, the balance of the judgment be paid in due course of administration; and that any surplus remaining after the satisfaction of the judgment out of the proceeds of the sales, be paid to the administratrix.

The defendant appeals from the judgment, and from the order refusing to dissolve the attachment. The order is not an appealable order, (*Alender v. Fritz*, 24 Cal. 447,) but all the material points made in regard to the attachment arise also in the appeal from the judgment.

Form of judgment against an administrator.

The first question we shall consider relates to the form in which the judgment for the amount due upon the promissory notes ought to be rendered. It will be seen that the complaint is, in substance, the usual complaint upon a promissory note in a suit by the payee against the maker, and contains no allegations entitling the plaintiff to any relief beyond the ordinary judgment *in personam*.

The suggestion of the death of the maker of the notes, and the substitution of his administratrix, and the continuance of the suit against her, subjected the proceedings to such rules of the Probate Act as are applicable to proceedings for the collection of claims against an estate of a deceased person. It was in this view that the plaintiff presented his claim to the administratrix for allowance. An administratrix is the creature of the Probate Act, and her liability must be measured by that Act. There is no provision in the Act subjecting her to a judgment *in personam*, upon the sole ground that the estate of the deceased is indebted to the plaintiff. Under any system with which we are acquainted, the further allegation of assets, *a devastavit*, or some other ground of personal responsibility, is necessary to support such a judgment. But this point is settled by section one hundred and forty of the Probate Act, which provides that "the effect of any judgment rendered against any executor or administrator, upon any claim for money against the estate of his testator or intestate, shall be only to establish the claim, in the same manner as if it had been allowed by the executor or administrator, and the Probate Judge, and the judgment shall be that the executor or administrator pay, in due course of administration, the amount ascertained to be due."

The judgment should have been rendered in the form indicated in that section, for the section is mandatory, and specifies the only judgment that may be rendered against the executor or administrator, on a claim against the estate.

Opinion of the Court — Rhodes, J.

Judgment enforcing attachment lien.

The next question is whether that portion of the judgment ordering the property that had been attached, to be sold for the payment of the judgment, is authorized by law. No provision of the Practice Act is cited that justifies such an order. When the judgment is rendered against the debtor in his lifetime, we find no authority for an order of that character in an action of the nature of the one before us, and it is difficult to see how the mere fact of the substitution of the legal representative in the place of the debtor could authorize the order without the aid of a statutory provision permitting it. The principle is cardinal and uniform that the judgment for the plaintiff must be founded on and authorized by the allegations of the complaint. The attachment and levy formed no part of the pleadings and were not competent evidence of any fact stated therein, but came before the Court incidentally and on a motion that had no relation to the merits of the action. The order is in its nature a decree enforcing a lien, and is as clearly unauthorized as would have been a decree enforcing a vendor's lien, if it had happened in the case that the plaintiff in proving the consideration of the notes had shown that they were given for the purchase money of certain real property belonging to the estate of the intestate. The impropriety of the judgment is made manifest by supposing that a portion of the attached property is exempt from execution, that another portion is the separate property of the widow of the deceased, and that a portion or all of the real property attached constituted the homestead of the deceased and his wife. Certainly those questions could not be tried without proper issues were framed, and it is impossible to see how the administratrix could have raised them in the suit on the notes, unless she is required to answer not only the complaint, but the Sheriff's return to the attachment also. This she would be bound to do or be precluded thereafter from asserting her claim to the property, by the judgment of the Court ordering the property to be sold, if such judgment, based upon the single fact that

the property has been seized under attachment, can be maintained. The Court, in rendering judgment in an action in which an attachment has been procured and served, has no duty to perform in reference to the attachment proceedings. The Sheriff does not act in obedience to the judgment, but to the behests of the statute, in enforcing the attachment lien, by the sale of the property attached.

This virtually disposes of the appeal, but to rest the cause here would leave the real point of controversy untouched, and it would necessarily arise on further proceedings, surrounded, perhaps, with additional difficulties. The question is, whether the attachment lien survives, in case of the death of the defendant, before the expiration of the time for filing his answer in the action in which the attachment issued.

An attachment is a process under which the debtor's property may be seized and held as security for the satisfaction of any judgment that may be recovered against him in the action, unless he gives security for the payment of the judgment, in the manner provided by the statute. Its scope, purpose and effect; its capacity to create a lien; the efficacy, duration and the mode of enforcement of the lien, are not other or greater than the statute has prescribed. The plaintiff cannot claim as matter of right the benefit of the attachment, as something growing out of or necessarily connected with the contract, as he may the benefit of an action to recover his debt; for the attachment is merely an auxiliary to the action, and the Legislature may give, withhold or limit it, at their pleasure, without impairing any substantial right of either party. The lien acquired by means of the attachment does not necessarily attend the action, without regard to the judgment that may be rendered. Its purpose is to secure the payment of the judgment, and this is accomplished by its holding the property until the judgment is rendered—and in case of real property, until the judgment is or may be docketed—so that the attached property may be taken and sold under an execution to be issued upon the judgment. No property may be taken in attachment that is not liable to seizure under the execution

when issued; and the only way in which the levying of the attachment upon the property operates as security for the satisfaction of the anticipated judgment, is by its capacity to hold the property to await the execution to be issued. This is necessarily implied by section one hundred and thirty-two, providing for the sale of the attached property, and no other mode than a sale under execution is provided by the statute, for enforcing the attachment lien upon property held under the writ. Property that has been converted into money, because the interest of the parties required its sale while held under attachment, forms no exception to the usual course of proceedings respecting property held under attachment, for the money in the officer's hands, though not required to be levied upon under the execution, because not required to be sold, can be applied to the satisfaction of the judgment only when the plaintiff is entitled to an execution, and it is appropriated in the same manner as when made under the execution. When the action is of such a character, or when its condition has become such, by reason of a change of parties or other cause, that a judgment *in personam* cannot be rendered against the defendant, an execution in the usual form, commanding the Sheriff to satisfy the judgment by a seizure and sale of the personal and real property of the defendant, is not authorized to be issued. A personal judgment against the administratrix in this case was not the kind of judgment, as we have seen, that the statute required or permitted, but it should have been, that the amount ascertained to be due to the plaintiff be paid by the administratrix in due course of administration. A payment in the due course of administration, means the payment by the legal representative of the deceased, acting under the orders of the Probate Court, out of the assets of the estate of the deceased, and in the manner and order that other debts of the same rank are by the Probate Act required to be paid. It will not be contended that a judgment in that form, authorized the issuing of an execution; and, indeed, it is directly forbidden by section one hundred and forty of the Probate Act, to be issued.

Death of defendant destroys the lien of an attachment.

It necessarily results from these statutory provisions and legal principles, defining the character and purpose of the attachment lien and the mode of its enforcement, that whenever the case is such that a judgment cannot be legally rendered, that will authorize an execution against the personal and real property of the defendant, the attachment lien at once ceases. There is nothing in the Practice Act that countenances the idea that the attachment is of the nature of a common law distress of the defendant's property, to be held until he pays the plaintiff's demand, but it is held in order that it may be subject to execution. When that purpose is impossible of accomplishment the right to hold the property for that purpose ceases.

The effect on the attachment, of the death of the defendant, before judgment, is considered in several cases cited in *Drake on Attachment*, (Sec. 433), and in most of them it is held that the death of the defendant dissolves the attachment. The statutes of the several States providing for an attachment differ in their structure, but that many of the States have the same general purpose as that of this State, and the authorities, though not conclusive because of the difference between the statutes, aid in some measure in arriving at a proper construction of our own statutes. (See *Davenport v. Tilton*, 10 Met. 320; *Sweringen v. Eberius*, 7 Mo. 421; *Harrison v. Renfro*, 13 Mo. 446; *Kennedy v. Raguet*, 1 Bay, 484; *Crocker v. Radcliff*, 1 Const. R. S. C. 83.)

Some of the provisions of the Practice Act and of the Probate Act support this theory in respect to the attachment lien. It is provided by section two hundred and two of the Practice Act, that if the defendant die after verdict or decision upon an issue of fact, and before judgment, the Court may render judgment, but it shall not be a lien upon the real property of the defendant, but shall be payable in the course of administration on his estate. This would be a very incongruous provision, if, while a judgment lien was prohibited, an

attachment lien was permitted to continue in force. And besides this, the creditor, by means of the attachment, might nullify the provision for the payment of the judgment in the due course of administration; for if the assets consisted of personal property only, he would be enabled to withhold from the administrator, all the property with the proceeds of which the judgment might be paid, while the creditor was at the same time without power to issue an execution, under which to sell the property and make his debt.

By section two hundred and fifteen of the same Act, as it stood previous to April 4th, 1864, execution against the property of a defendant who had died after judgment, might be issued upon the permission of the Probate Court; but by the amendment of 1864, in force when the judgment in this case was rendered, authority is given to issue execution only in case of judgments for the recovery of real or personal property. This negatives the right to any other description of an execution, and when considered in connection with the provisions of the Probate Act treating the judgment as a claim, it, by implication, clearly forbids the issuing of an execution in case the defendant dies, not only before judgment, but at such a time in the progress of the action that a judgment could not have been rendered against him. And besides this, section one hundred and forty of the Probate Act directs that no execution shall issue upon a judgment against the executor or administrator upon a claim against the estate, and that the judgment shall not "create any lien upon the property of the estate, or give the judgment creditor any priority of payment."

The provisions of the Probate Act providing for the order of payment of the claims against the estate (Section 239) are also conclusive upon this point. The section is as follows: "The debts of the estate shall be paid in the following order: First—Funeral expenses. Second—The expenses of the last sickness. Third—Debts having preference by the laws of the United States. Fourth—Judgments rendered against the deceased in his lifetime, and mortgages, in the order of their

date. Fifth—All other demands against the estate.” The debt in this case is not included in either of the first four classes, and must fall within the fifth class, otherwise it is not entitled to payment out of the estate. No preference is given to any debt of that class over others of the same class, and to make it clear that no preference among the debts of any class, except those in the fourth, was intended, the next section declares that if the estate be insufficient to pay all the debts of any one class, the fund must be distributed *pro rata* among all the debts of that class. These provisions are utterly inconsistent with the proposition that the attachment lien continues, notwithstanding the death of the debtor, for if it is a subsisting lien the debt secured thereby must of necessity be entitled to a preference over other debts of the same class.

The plaintiff's position is not strengthened by section one hundred and eighty-six of the Probate Act. That section, among other things, provides that the administrator upon making sale of the land of the deceased which is subject to a mortgage or other lien, shall apply the purchase money, after paying the expenses of the sale, first to the satisfaction of the mortgage lien. Before he could claim the application of the purchase money to his debt in case of a sale under the order of the Probate Court, he must prove the very point in controversy — that the attachment continues a lien on the land in the hands of the administrator. He cannot claim the benefit of this section to sustain the lien upon the personal property, for there is no provision that the proceeds of the sale of such property when sold by the administrator shall be applied to discharge a lien.

Here no lien can be acquired by means of the judgment, and no execution is permitted, and the purpose of the attachment becoming impossible of accomplishment, by reason of the death of the defendant, it must of necessity, upon the happening of that event, have ceased to be a line. Assuming that the attachment lien is included in the term “lien” as employed in section one hundred and eighty-six, we are led to this absurd

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conclusion, that the administrator of an estate may be compelled by the Probate Court to pay a demand that he was then resisting in another Court, and might ultimately have materially reduced or entirely defeated.

It would seem that if the Legislature had intended that the lien of an attachment should be preserved in the event of the death of the defendant before judgment, while, at the same time, denying to the judgment the power to create a lien upon the property of the deceased, and forbidding the issuing of an execution upon the judgment, they would have manifested their intention by some unequivocal provision of the statute, and not have left it to be gathered by doubtful implication.

Judgment reversed and the cause remanded, with directions to enter judgment for the plaintiff for the amount due upon the promissory notes sued on, to be paid in due course of administration, in the current gold coin of the United States.

SHAFTER, J., dissenting.

The plaintiff sued W. A. Mott in his lifetime on two promissory notes, payable, severally, in gold coin of the United States. The summons was accompanied by a writ of attachment, which was duly levied upon certain real and personal property of the said defendant, March 9th, 1864, on which day the summons was also served. On the day following Mott died intestate, and thereafter on the 3d of May, 1864, the appellant was, on her own motion, substituted as defendant, it appearing that she had been appointed as administratrix of the estate of the deceased. Such proceedings were thereafter had in said action that judgment was entered in favor of the plaintiff. Among other special provisions contained in the judgment was one directing the Sheriff to sell the property attached in like manner and upon like notice, as is required by law in sales of personal property on execution; the proceeds to be applied in satisfaction of the judgment; and in case of a surplus, the surplus was to be paid to the

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administratrix, and if there should be a deficit, it was ordered to be paid in due course of administration.

It is insisted that that portion of the judgment which contains these special directions, is erroneous; and the objection is put upon the ground that the attachment was dissolved by the death of Mott.

The argument for the appellant, in so far as it goes upon considerations of convenience, is entitled to very little weight, if the meaning of the statutes by which our decision must be controlled is reasonably clear; and the same may be said as to the cases cited from other States, for those decisions are in elucidation of systems differing to a greater or less extent from our own.

By the common law, a suit was abated — that is, ended, by the death of either of the parties to it, and it could not be revived; but by the sixteenth section of our Practice Act it is provided that the action, if the cause of it survive, shall not abate by the death of a party to it, but may be continued by or against the personal representative on motion. When an action, in such case, has been so continued, all rights involved directly in the suit, and all collateral remedies to which the surviving litigant may have entitled himself under the law, are secured to him as effectually as though the death had not occurred.

In *Moore v. Thayer*, 10 Barb. S. C. 259, an attachment had been levied, and summons issued before the death, but there had been no personal service, and the order of publication had been only partially complied with; still it was held not only that the Court had acquired judgment of the action, but also that the plaintiff had acquired a provisional lien upon the defendant's property, which lien the code was intended to preserve; and it was held that the lien should be enforced. The one hundred and twenty-first section of the New York Code, and the sixteenth section of our Practice Act, are in substance the same. The objection that the sixteenth section continues the "action," but not the provisional remedy, is opposed not only to the above decision, but to the maxim

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that the accessory follows its principal. It was held in *Low v. Adams*, 6 Cal. 281, that "the remedy by attachment" is not a distinct proceeding, but an adjunct, or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor to answer the judgment, which may be obtained. This is apparent from the language of our statute, which provides "that the plaintiff, at the time of issuing the summons, or at any time thereafter, may have the property of the defendant attached as security for the judgment," etc.

Again, the plaintiff by his attachment acquired a lien, differing in origin to be sure, but in its essential nature like the lien acquired by mortgage or pledge. (14 N. H. 509; 10 Met. 320; 1 Zabriskie, 214; 10 S. & Mar. 348; 1 Day, 117.) And it was held in *Isaac v. Swift*, 10 Cal. 71, that "where a lien is created by the express words of a statute, express words will be required to continue it beyond the time specified;" and it may be added that if the action in which an attachment is made continues, then the attachment and the lien acquired by it must be continued by parity, unless dissolved by some statute provision. (Drake on Attachment, Section 400, and cases there cited.)

There is nothing in our statute law connecting with the death of a defendant in an attachment suit, any such consequence. Holding, as I do, that the provisional remedy in case of death is kept on foot by a continuance of the "action" under section sixteen, it follows that the consequence named must be considered as expressly inhibited in effect, by sections one hundred and twenty-three, one hundred and twenty-four, one hundred and twenty-five, one hundred and twenty-six, and one hundred and thirty-two of the Practice Act, providing for the custody and final disposition of the property as well as for its seizure in the first instance. It will be seen that the question is put upon that portion of the Practice Act relating to attachments, and upon a construction of section sixteen, providing for a continuance of actions in case of death. The system for the collection of debts by attachment, and the pro-

bate system, though interblended to some extent, are distinct from each other in the main. Each goes upon its own separate conditions and theories, and all apparent conflict between the two may be harmonized by keeping that fact steadily in view. The provision of the Practice Act requiring the Sheriff to keep personal property attached in his custody, and the provision of the Probate Act (Section 114,) giving to the representative of a person deceased the right to the possession of all his property, may both have an operation; and so as to those sections of the Probate Act (Sections 140, 141,) fixing the effect of a judgment against an executor or administrator, and those sections of the Practice Act which require with legal positiveness that a judgment rendered in an attachment suit should be satisfied out of the property attached. This method of exposition was repeatedly recognized by the late Supreme Court. In *Cowell v. Buckelew*, 14 Cal. 641, it was held that the one hundred and forty-first section of the Probate Act applies only to such money judgments as require, whether in whole or in part, for their satisfaction, execution against the general property of the deceased. And it was further held in the same case that the one hundred and forty-eighth section, which provides that "no sale of property of an estate shall be valid unless made under order of the Probate Court," applies only to sales by executors and administrators.

The probate system in the matter of the payment of debts, is, with the exception of certain preferred claims, founded upon the principle of *pro rata*, while the system of the Practice Act recognizes the principle of priority of right in an attaching creditor, confining the priority however to the property covered by the attachment. Many objections have been urged against the latter system, but the Legislature in adopting it overruled them all, and its supposed inequitable operation in cases like the one at bar, is neither greater nor less than that which follows its action generally. The Legislature in providing in effect that an attachment may be enforced in cases where a defendant dies pending the litigation, has merely included within the operation of the rule a case to which the

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principle on which the rule is founded clearly extends. When the people become dissatisfied with any of the consequences of the system, they will probably have become dissatisfied with all the consequences, and abandon the system.

As execution could not be enforced against the estate at large, but only against the property attached, it became necessary that a special order should be entered, limiting the proceedings under the execution to that property. (*Kittredge v. Warren*, 14 N. H. 509.) The judgment that if the proceeds of the sale shall be insufficient to satisfy the judgment, the balance shall be paid in due course of administration, is within the spirit of the one hundred and fortieth section of the Probate Act, and at the worst is but a surplusage.

On these grounds, I dissent from the prevailing opinion.

SAWYER, J., also dissenting.

For the following reasons, in addition to those stated in the opinion of Mr. Justice SHAFTER, I am unable to concur in the views expressed by a majority of the Court upon the principal question involved in the case:

In many of the States the process of attachment was originally adopted as a means of compelling the appearance of non-resident and other debtors, upon whom the ordinary process of the Courts could not be served. Upon the appearance and putting in of bail in the manner required by the practice then in force with respect to other process, the attachment was dissolved. In many instances the remedy was extended to cases where debtors were fraudulently concealing, removing or otherwise disposing of their property with an intent to defraud their creditors. In California the remedy has been extended over a wider field, and it seems to proceed upon a theory different from the attachment laws of any other State. The design of our law seems to be, not merely to reach non-resident and absconding debtors, or to circumvent fraud, but to afford the creditor, upon the statutory conditions, a security

for every demand not otherwise secured, arising upon contract for the direct payment of money made in the State, in which there has been a default in payment. Security to the vigilant seems to be the leading idea upon which the law is framed. The moment the attachment is levied, a lien upon the property attached is acquired. The lien becomes specific, and the party acquires a right to have any amount that may be found due upon the contract satisfied out of the specific property. It is a right vested upon the conditions prescribed by the statute. The law favors the diligent, and not those who sleep on their rights. The plaintiff incurred the costs of a suit to secure the right given by the statute, and by this means acquired for himself, to the exclusion of all others, the statutory lien on the defendant's property, and a right to be first paid out of its proceeds. This right became vested, and being once vested should not be divested, unless by virtue of some express statutory provision, or by necessary implication from provisions bearing upon the subject matter. I have not found any express provision of the statute to the effect, that the attachment shall be dissolved by the death of the defendant before judgment. If any such result can be deduced from the various statutes, it must be by remote, and not very apparent, or satisfactory inferences. That a specific lien has been once secured, there can be no doubt. "I see no reason why the lien acquired by attaching a particular piece of land should not be considered as much a specific lien, as if acquired by the voluntary act of the debtor." (*Carter v. Champion*, 8 Conn. 559.) "An attachment constitutes a lien — a real interest in the land, which may be followed up to a perfect title." (Mr. Chief Justice Shaw, in *Smith v. Bradstreet*, 16 Pick. 265.) It is well settled, that the levy of an attachment constitutes a lien within the meaning of that term as used in the Bankrupt Act of 1841. (*Kittredge v. Warren*, 14 N. H. 510; *Vreeland v. Bruen*, 1 Zab. 222; *Davenport v. Tilton*, 10 Met. 320; *Peck v. Jenness*, 7 How. U. S. 612.) The observations of Mr. Chief Justice Parker, in the first case cited, are not inappropriate to the question now under consideration. He says (14 N. H.

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530): "So far as it relates to the question whether an attachment is a lien or security, it is not necessary to add anything to what has been already said upon that subject. If this lien or security were contingent or conditional, it is not perceived why that should take it out of the express language of the proviso, which includes all liens and securities, valid by the laws of the State. The fact that it is dependent upon, and may be defeated by a contingency, does not make it anything the less a lien or security so long as it exists. But the existence of the lien or security is, in our view, in no way contingent, conditional or inchoate. Its existence does not depend upon the judgment. It exists, in its full force, from the moment the attachment is made, as much so as a lien by judgment, upon the rendition of the judgment, in the States where that security is recognized. As we have already seen, it fastens itself upon, and binds the property at once, giving priority of right, and, in the case of personal property, authorizing the Sheriff, for the benefit of the creditor, to hold the possession, to maintain actions, and in some cases even to sell and dispose of the property itself, before either a default or judgment. It is originated by the suit, and sustained by the suit, but it is no part of it. It can only be made available through a judgment, but the judgment neither changes its nature nor determines its validity; nor does it operate to perfect the attachment. The judgment establishes the existence of the demand upon which the attachment is predicated, and the security taken; whereas it was before only alleged, and presupposed for the purpose of the security. The security is not inchoate, but it is conditional in the sense that liens by judgment are conditional. It depends upon contingencies whether it will ever be made available to the creditor, and so it is with liens by judgment, where there is a period when they cease to exist, if the judgment creditor has not proceeded to seize the property. The continuance of a lien by attachment depends upon one contingency beyond liens by judgment, which is, that the plaintiff sustains his suits; but the fact that the law authorizes it to be fastened upon the property in

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invitum, before the existence of the demand is admitted or ascertained, and that it may be defeated and dissolved if it shall appear that the plaintiff has no claim, neither disproves its existence as a security before the demand is ascertained, nor shows that it did not confer vested rights from the moment it was taken. A pledge to secure all demands which may be due from the pawner to the pawnee is not the less a pledge, or the lien less perfect, because it may appear, upon an accounting, that nothing is in fact due. And an accounting, by which the pawner is found indebted in a certain sum, has no operation to perfect the pledge, although it ascertains the amount for which it stands as security. Nor does the expiration of the day of payment, by which the pawnee obtains a right to sell the pledge and apply the proceeds in satisfaction of his demand, perfect the security, although it gives an absolute right to sell the pledge, which did not exist before."

"Whether any lien will be available to the party entitled to it, is usually a contingent matter, dependent upon his pursuing the regular steps to enforce it."

If the existence of the lien does not depend upon the judgment; if it exists in its full force from the moment the attachment is made; if it fastens itself upon, and binds the property at once, giving priority of right; if it is originated by the suit and sustained by the suit, but is not a part of it, it is certainly not affected or defeated by the subsequent death of the defendant, unless the suit itself abates, or that result is accomplished by, or plainly and necessarily inferable from, some positive statutory provision; and in my opinion the provisions of the statute cited in the prevailing opinion cannot properly be so construed as to work such a result. No allusion is made to attachment liens in any of those provisions. They all apply to a different subject matter, and none of them appear to me to be inconsistent with the idea that the lien may survive. Under our statute (Practice Act, Sec. 16) the suit itself does not abate by the death of either party. In all cases where there is any occasion for it, the suit may be continued against

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the representative of the deceased defendant. If the attachment is dissolved by the death of the defendant, it is not because there is any express provision to that effect, but it must be implied from the failure to make any express provision for subsequent proceedings to enforce the lien. After a careful examination of the subject my mind is forced to the conclusion, that the attachment having been levied, and a specific lien upon the property having been acquired during the lifetime of the deceased, the attachment was not dissolved, nor the lien discharged by the death of the defendant in the suit. Nor does it seem to me that the authorities cited in the prevailing opinion to sustain the opposite conclusion can have any influence in determining the question. Indeed, not much reliance seems to be placed upon them. The case of *Davenport v. Tilden*, 10 Met. 320, only decides, that an attachment of property upon mesne process constitutes a lien within the meaning of the term as used in the General Bankrupt Act of 1841, and that, when a discharge is set up as a bar to an action secured by a lien acquired through an attachment levied before the proceedings in bankruptcy were commenced, "the plaintiff may have a special judgment rendered, and an execution awarded against the attached property only." This case, so far as it has any bearing upon the questions now before us, appears to me to sustain the position maintained in this opinion, that there is a lien, and that a special judgment enforcing the lien may be rendered. I shall have occasion to refer to the case again. The cases in South Carolina of *Kennedy v. Raguet*, 1 Bay, 484, and *Crocker v. Radcliffe*, 1 Const. S. C. R. 83, depended upon different principles. The attachment law of South Carolina was only designed to compel the appearance of a non-resident, or absconding debtor. Upon his appearing and putting in bail, the attachment was dissolved. So, after putting in bail, if the defendant died, the suit abated and the bail was discharged; and the attachment simply stood in the place of bail, and was subject to the same incidents. The Court say, as the result of their reasoning in the latter case (1 Const. S. C. R. 87): "From this view of

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the Act, it seems evident that the death of the defendant must be material, and upon that event the *suit abated in the same manner as it would have done if he had given bail to the action.*" The object and scope of the attachment law of South Carolina was entirely different from that of ours. The same remarks are applicable, to some extent, to the statutes of Missouri, under which the remaining decisions referred to were made. The case of *Swearingen v. Eberius*, 7 Mo., did not involve the question, and only one of the Judges expressed an opinion on it, (see 13 Mo. 448) and he seemed to lay some stress upon the fact, that "the attachment is given against certain persons who by their conduct subject themselves to the suspicion of fraudulent conduct;" upon which he remarks: "And when the defendant dies, one would suppose that, as he is no longer able to defeat the just claims of his creditors, this lien of the attachment ought also to die." The Judge adds other reasons, applicable to judgment as well as attachment liens, and holds that, under the statute of Missouri, a judgment lien also dies with the defendant, and that, *a fortiori*, a mere lien without judgment dies. In *Harrison v. Renfro*, 13 Mo. 449, two of the Judges seem to have been of opinion that the attachment lien is lost by the death of the defendant, and that, "as the supposed owner is dead and incapable of further fraud or injustice, this may be a very unimportant matter to the plaintiff." They regard the failure to provide for the lien as a *casus omissus*. The other Judge dissents, and is of the opinion that a Court of equity has power to enforce the lien. The opinions of the Judges holding the lien to be lost are far from satisfactory to my mind. But, whether right or wrong, they do not afford any aid in the construction of our statute.

It is true that the attachment lien can only be made available through a judgment of some sort. But this is ordinarily equally true of a lien by mortgage, or a mechanic's lien. It is also true, that, in a case wherein the defendant dies pending the action, neither the Probate Act nor the Practice Act makes any specific provision for enforcing an attachment lien acquired in the action before the death of the defendant. Under sec-

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tion two hundred thirty-nine of the Probate Act, if literally construed, the Probate Court could only pay the debt secured in the course of administration, without reference to the lien. Under that section only two kinds of liens are authorized to be paid, viz: "judgments rendered against the deceased in his lifetime, and mortgages in the order of their dates." Yet section one hundred thirty-three speaks of claims "secured by a mortgage or other lien." What other lien? There are many liens other than those authorized to be paid by any express provision of the Probate Act. What is to become of such other liens, if the fact that they are not specifically provided for, and that only certain specified demands can be paid, and in a prescribed order, is to prevent payment by the Probate Court? Are they to be lost to the parties holding such liens? The same argument by which it is inferred that the death of a defendant destroys an attachment lien would lead to the conclusion that all other liens, not specifically mentioned and provided for, become discharged by the death of the owner of the property upon which the liens are charged. So also, section one hundred eighty-six speaks of liens other than mortgages, and authorizes their payment; but the provisions are limited to liens on land. No provision whatever is made for liens on personal property. But it does not follow that there is no remedy, where none is expressly provided. In all cases where there is a valid lien, and no specific provision is made for giving it effect, the District Court, by virtue of its general jurisdiction over such matters, must have authority to enforce it. The District Court, I apprehend, would have jurisdiction to enforce a vendor's or mechanic's lien upon real estate after the death of the vendee, or owner, notwithstanding the Probate Court might pay it under the provisions of section one hundred eighty-six, as it now stands, upon the same principle that it could foreclose a mortgage under like circumstances; and I apprehend that a vendor or mechanic did not lose his lien by the death of the vendee, or owner before the recent amendment of said section authorizing its payment, notwithstanding there was no other provision authorizing such pay-

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ment. So, also, it would have jurisdiction to entertain a suit to determine the rights of the pledgee, and order a sale of the property pledged after the death of the pledgor; or to enforce a lien of a party having property in his possession subject to a lien for labor bestowed in making the article, or for repairs; or the lien of an innkeeper or carrier. The Probate Act, so far as we are aware, makes no provision for the continuance or payment of these classes of liens on personal property; yet the party claiming the lien cannot be without a remedy in the Courts when the owner happens to die. All of these cases are as clearly within the provisions relating to judgments, and prohibiting the issue of executions, and prescribing the kind of demands to be paid, and the order of payments, as are attachment liens. In none of these cases could a judgment, in the ordinary form for the recovery of a money demand, be entered, nor the ordinary execution in such cases be issued. The judgment would be for the sale of the property and the application of the proceeds to the payment of the demand, and in a proper case, that any balance remaining unsatisfied be paid in course of administration. And the judgment would be enforced in the same manner as in the case of a judgment foreclosing a mortgage. Upon the same principle, I can see no good reason why the District Court has not jurisdiction to enforce a lien acquired upon real or personal property in the course of judicial proceedings, where the defendant in the action dies after the lien has attached, and before judgment, and no other specific remedy is provided.

The judgment can readily be adapted to the exigencies of the case, and would be similar to a judgment for the enforcement of other liens, and would be enforced in the same manner. The remarks of Mr. Chief Justice Shaw in *Davenport v. Tilton*, cited in the prevailing opinion, are apposite in this connection. In that case, after the commencement of the suit and attachment of the property, the defendant having procured his discharge from all his debts under the general bankrupt Act of 1841, plead such discharge. The defendant having been discharged from all his debts, including the debt in suit,

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it was contended that no judgment could be entered against him; that no mode of enforcing the attachment line was provided; that the lien was only security for any judgment that might be recovered in the action, and could not be made available except through a judgment; and as no judgment could be rendered upon a debt which had ceased to exist, the lien, even if excepted in terms in the statute, was necessarily lost.

The Chief Justice said (10 Met. 328-9): "*This consideration leads to another rule of exposition, which is, that when a statute confers a right, it confers all the necessary means by which such right can be established and made effectual.* The exception of liens, mortgages and securities on property is made for the benefit of the holders of such securities, and they are entitled to the use of the necessary legal means of making them available. If so, and if an attachment on mesne process is a lien or security on property, to be made available only by a judgment and execution of some kind, then the above proviso would in legal effect stand thus: Provided that nothing in this Act contained shall be construed to prevent an attaching creditor from obtaining such judgment and execution as may be necessary to give legal effect to his attachment on the property of the bankrupt, made before the proceedings in bankruptcy were commenced. But where such exception is founded on implication it must be a necessary implication, and will be extended no further than is necessary to give effect to the right reserved. The discharge will still have its full and complete effect, except so far as the existence and operation of a judgment may be necessary to enable the creditor to have a special execution awarded, and to take the attached property upon it. It would not have the usual attributes of a judgment as record evidence of a debt, on which an action will lie, and upon which the person of the debtor may be arrested, or other property than that attached taken in satisfaction. In all these respects, the discharge would still have its effect. It would be, though still in form a judgment *in personam*, in substance, and legal effect, a judgment *in rem*, binding the specific property attached."

And again, with respect to a special judgment and execution he says (pp. 330-1): "If, therefore, we entertained more doubt as to the general question, we should strongly incline to the opinion that, under the circumstances of the present case, the plaintiffs would have a legal right to maintain their prior lien over the claim of another separate claimant who, if the plaintiff should fail, would hold the property against both the bankrupt and his creditors; *and that the plaintiffs are entitled to such special judgment and award of execution as will enable them to maintain that priority.* (See *Storm v. Waddell*, 2 Sandf. 494.) Such special judgment, or special award of execution, although not frequent, is not unprecedented. The law having exempted the person of a debtor from arrest, after having taken the poor debtor's oath, leaving his property liable, the process may be varied accordingly. And, generally, where a party has a right which cannot be obtained by the ordinary forms of process, the Court will vary these forms so as to secure the party his right. (*Cooke v. Gibbs*, 3 Mass. 193.) Express authority is given to the Courts by Revised Statutes (Chap. 97, Secs. 10-11) to vary the form of execution when necessary to adapt them to the changes of the law, or for other sufficient reasons. *And it is believed that such special judgment and award of execution are not unknown to the common law of England, when the rights of the parties require it.*"

In this case, by the attachment the plaintiff under the statute acquired a lien upon, and a right to have this demand satisfied out of, the property attached, and, as I think, by no express provision of the statute, or necessary implication from statutory provisions, was the lien lost, or right impaired by the subsequent death of the defendant. If this be so, and if, in the language of Mr. Chief Justice Shaw, "when the statute confers the right, it confers all the necessary means by which such right can be established and made effectual" — and I have no doubt as to the truth of the proposition — then the District Court has the power to enforce the lien.

Mechanics' liens for the constructions of buildings; for the manufacture or repair of articles of personal property; inn-

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keepers' and carriers' liens, and the like, are as much liens *in invitum*, imposed by law independent of conventional stipulation, as liens by attachment, and, when the right has once attached, the latter are no less sacred, and no more without the pale of legal remedy than the former. The purpose of the attachment is to secure the debt, and the judgment only ascertains that there is in fact a debt to be secured, determines its amount, and enforces its satisfaction out of the property attached, if sufficient; and if insufficient, in a proper case, to the extent necessary, out of the other property of the debtor. The views expressed in this opinion do not appear to me to be inconsistent with the provisions of section two hundred two of the Practice Act cited in the prevailing opinion. In the cases there mentioned no lien was acquired during the lifetime of the defendant. The lien mentioned is a *judgment lien*, not a *lien by attachment*. In the case of an attachment on mesne process, the lien is created *by the levy*, and not *by the judgment*, and, as we have seen, is wholly independent of the judgment. *The judgment does not create the lien, but is only a means of enforcing a lien already created by the levy* — of giving effect to a right before acquired and fully vested. These remarks are also applicable to section one hundred forty of the Probate Act. The provisions of this section refer to the naked judgment simply establishing a demand. It speaks of the effect of *the judgment*, not of a *lien already acquired*. It says the *judgment shall not* "create any lien upon the property of the estate;" not that it *shall not enforce a lien already created and vested*. The judgments and executions spoken of are judgments and the executions to be issued thereon in the ordinary cases where no lien already exists. The provision has no reference whatever to proceedings to enforce mortgages, mechanics' and other liens, or to the modes of executing judgments in such cases.

Conceding the right to exist, there is nothing in the forms of judicial proceedings in this State to prevent the granting of the relief in this action. The proper course of proceeding in such cases would, perhaps, be, by supplemental complaint to

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aver the death of the defendant, and the facts showing the particular relief to which the plaintiff has become entitled by reason of the events happening subsequent to the institution of the suit, so that the facts may be presented in an issuable form in the pleadings. In this case the death of the defendant was suggested, and his representative substituted in the record, and the record of the case shows all the facts necessary to entitle the plaintiff to the relief obtained. The property itself is in the custody of the law, and under the control of the Court, in this very case. The Court finds all the necessary facts and grants the appropriate relief. The only objection, as it seems to me, that could be plausibly urged, is, that it does not appear by the transcript that the levy of the attachment and the existence of the lien was set up in a supplemental complaint, so as to make all the facts constituting the basis of the judgment appear in the pleadings. But this objection, if valid, was not made in the Court below, nor has it been made here. The appellant relies upon the ground that the attachment was dissolved by the death of the defendant, and consequently that no lien survived to be enforced. Upon this ground he rests his case. It may be that a supplemental complaint was filed, setting up the facts. However this may be, the attachment, in my judgment, was not dissolved by the defendant's death, and the facts, as they exist, justify the order for a sale of the property, and application of the proceeds to the payment of the amount found due.

BARTLETT DOE AND JOHN S. DOE v. JOSE VALLEJO,
SOLEDAD VALLEJO, HIS WIFE, JONAS G. CLARK,
JAMES SMITH, SIMON BACHMAN, AND CHARLES
KERN.

JUDGMENT IN FORECLOSURE FIXING BOUNDARIES OF LAND MORTGAGED.—Where the description of the land mortgaged, as written in the mortgage, contains a latent ambiguity which renders it uncertain what are the boundaries of
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the premises mortgaged, the Court may, in an action to foreclose the mortgage, as between the mortgagee and mortgagor or his grantees, determine, and by its judgment fix the boundaries of the land upon which the lien has attached.

ORDER DENYING NEW TRIAL IN AN EQUITY CASE.—On an appeal from an order denying a new trial in an equity case, the appellate Court, under the system of practice in force in this State, will apply the same rule with reference to balancing conflicting testimony which it would if it had been an action at law.

DESCRIPTION OF LAND IN CONVEYANCE.—Although distances and quantity must yield to natural monuments in determining the boundaries of land, yet they are entitled to some weight in getting at the intention of the parties where there is a latent ambiguity as to what monument was intended.

INTEREST UPON INTEREST PAST DUE.—If by the terms of a promissory note the interest is due and payable at the end of every six months, the payee is not entitled under the statute of this State to interest upon interest if the instalments of interest are not paid as they fall due, unless there is an express provision in writing to pay such interest.

APPEAL from the District Court, Third Judicial District, Alameda County.

The Court below in giving judgment did not allow plaintiffs interest on the instalments of interest which were not paid when they fell due.

The plaintiffs appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

W. W. Crane, Jr., for Appellants, made the point that the Court should have granted appellants a decree following the terms of the mortgage, notwithstanding the answer and evidence of defendants, and argued that if the description was ambiguous, it was the misfortune of the mortgagees, and that the owner could not defeat their claim for a decree according to the precise terms of the mortgage, and that the purchaser at the decretal sale would buy at his peril, as to whether he obtained a large or small tract of land. In support of this he cited *Tryon v. Sutton*, 13 Cal. 490; and *San Francisco v. Lawton*, 21 Cal. 589. He also contended that the expression of quantity could not be taken into consideration in determining the boundaries of the premises, and cited *Stanley v. Green*, 12 Cal. 148; *Colton v. Seavey*, 22 Cal. 497; *Vance v. Fore*, 24 Cal. 436; and *Kimball v. Semple*, 25 Cal. 440.

James C. Carey, and *E. B. Mastick*, for Respondents, argued that the mortgage must be enforced according to the intention of the parties, and that there being a latent ambiguity, the Court must call in the aid of extrinsic facts to interpret the language of its calls, and that if the latent ambiguity was not removed a lien might be enforced on land which the parties never intended to have covered by the mortgage, and cited *Ramsdell v. Fuller*, 28 Cal. 37, and *San Francisco v. Lawton*, 21 Cal. 589.

By the Court, SAWYER, J.

This is an action to foreclose a mortgage upon a tract of land constituting a part of "Rancho del Alameda." The lands are described in the mortgage as commencing "at a point on the Alameda Creek, and about three hundred yards above the site of the old Vallejo mill, where a wire fence meets said creek; thence down said creek, following the meandering thereof, to a point where another wire fence meets said creek, and about three quarters of a mile from the starting point," etc., and ends, "embracing within said boundaries the grist mill, mill race and water privileges, and twelve acres of land, be the same more or less." The complaint follows the description of the mortgage. At the time said mortgage was executed, by starting at the point indicated as the point of commencement, and following the meanders of the stream, two wire fences would have been found on the same rancho — the first about one half mile, and the second about one mile and a quarter distant from the point of beginning. Regarding the first wire fence as the one intended by the terms, "another wire fence," and running the remaining lines, the lines so run would include a tract of twenty-five acres; but, taking the second as the fence intended, and running the remaining lines, they would include about three hundred and forty acres. After admitting in his answer the execution of the note and mortgage, the defendant Clark (who, subsequent to the execution of said mortgage, had acquired the title to the entire

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premises included within the outer lines, subject to the lien of the mortgage in question to the extent of the lands actually covered by it) sets up affirmatively the foregoing facts, and avers that in consequence of the existence of the two wire fences mentioned, either of which might answer the description, there is a latent ambiguity in the description; and that plaintiff claims that the second wire fence is the fence called for by the deed, when, in point of fact, the first wire fence is the true one, and prays that the Court may by its decree determine the first fence to be the fence called for and intended by the parties, and restrict the operation of the decree and sale to the smaller tract of land, and that the plaintiff, and those who may claim under him, may be restrained from hereafter setting up or asserting any claim or lien to that portion of the lands mentioned lying without the boundaries as indicated by the said first wire fence. The Court found the said first wire fence to be the one indicated by the calls of the mortgage, and limited the decree of foreclosure in accordance with such finding.

On the trial the plaintiffs introduced their testimony and rested. The defendant, Clark, then introduced his testimony and rested. At this point, before putting in their rebutting testimony, the plaintiffs moved for judgment on the pleadings, on the ground that no issue had been taken on the allegations of the complaint and no new matter constituting a defense set up. The Court denied the motion, and went on to determine the boundaries of the land covered by the mortgage, to which proceeding plaintiffs excepted; and this ruling constitutes the first ground of complaint.

In action to foreclose mortgage the Court may determine the boundaries of the mortgaged property.

It is true that the decree and the Sheriff's deed on a sale might have followed the description of the mortgage, and the parties might have properly litigated this question upon an action to recover the land. Or after a sale and conveyance thereunder, the party in possession of the disputed portion

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might have brought his action to have the claim of the other party determined. But the defendant, Clark, was called in to defend, and he chose to present the question and have it determined at once, before a sale, and we do not see any good reason why it should not be determined in this suit as well as hereafter. That the conflicting claim exists is made to appear. It is simply a question of location — of applying the description in the mortgage to the land to be sold — of ascertaining the land upon which the lien has attached and which the decree directs to be sold. It is not necessary to determine adverse titles. Both parties claim from the same source. The Court is simply called upon to determine by its decree what land the plaintiff is entitled to have sold by the terms of his mortgage, where it is shown that a latent ambiguity exists. It does not appear to us that any of the decisions cited by appellants determine that this question cannot be tried in this action. While there does not appear to be any good reason for not settling the whole matter now, without leaving it open for further litigation, there are weighty reasons why the question should be determined before a sale. If the claim of the plaintiff is well founded, the tract covered by the mortgage is about three hundred and forty acres of land, worth, without the mill privilege and property, from thirty to fifty dollars per acre. If not well founded, it covers only about twenty-five acres of land. Whether the claim of plaintiff is well founded under the terms of the mortgage and condition of the land to which the description is applicable, is left in doubt. If the property should be put up for sale, under a decree following the exact terms of the mortgage, without first solving the doubt, no person will be able to bid intelligently, because he will not know whether he is bidding for twenty-five acres, or three hundred and forty acres of land; and the rights of the defendant, under such circumstances, cannot fail to be ruinously sacrificed. So, also, the plaintiff himself — unless the smaller tract is ample security for his demand — is liable to suffer. The interest of all parties manifestly require, in a case like this, that the land called for should, if possible, be ascer-

tained before the sale takes place; and we can see no sound objection to the course pursued.

Rules of balancing conflicting evidence in law and equity.

It is next claimed that the finding of the Court, to the effect that the first wire fence is the one indicated by the calls of the deed, is not supported by the evidence; and it is insisted that, this being an equity case, the Court will not apply the same rule with reference to balancing conflicting testimony which it would, if the appeal was from an order denying a new trial in an action at law; that the Court will determine the questions of fact upon an examination of all the evidence, as if they had never been determined in the Court below. We had supposed that this Court had so often declined to make any distinction in the practice between cases at law and cases in equity, that the question might be considered settled. Our system does not contemplate any distinction in this respect, and there is no propriety in making any under it. Under the old chancery practice the testimony was taken by deposition, generally before a Master or a Commissioner, and reduced to writing. When the testimony had all been filed, the case was argued upon it before the proper Court, and on appeal the entire evidence was before the Chancellor or appellate Court in the same form in which it was presented to the Court below. The appellate Court had the same means of determining the credibility of the witnesses as the Court below. But it is not so under our system. Now the witnesses are examined in open Court, and only brief minutes of the testimony taken, as in actions of law. The record is brought to this Court by a statement on motion for new trial in the same mode as in actions at law. The Court below is possessed of all those aids necessary to enable it to give due credit to every item of testimony, which are accessible to the Judge who tries an action at law, and which, from the nature of things, are inaccessible to this Court. For these reasons, if for no other, there would be no propriety in making a distinction in the

two classes of causes. But it is enough to say that the principles governing the practice are already settled. (*Gagliardo v. Hoberlin*, 18 Cal. 395; *Duff v. Fisher*, 15 Cal. 379; *Green v. Butler*, 26 Cal. 599; *Allen v. Fennon*, 27 Cal. 69, and cases cited.) But were it otherwise, we should still be fully satisfied with the finding on this point. Indeed, we should have been much surprised, had it been the other way.

We are inclined to think the evidence admitted under plaintiffs' objection and exception admissible. But, whether it was or not, we do not see how the Court could have come to a different conclusion if it were thrown out of the case. As we view the testimony, the first wire fence much more completely harmonizes every course and distance with the calls of the description in the mortgage than the second. It is true that distances and quantity must yield to natural monuments, but they are entitled to some weight in getting at the intention of the parties, especially where they more nearly harmonize with one theory than the other. All of the distances and the quantity of land were arrived at by a very rough estimate. But a half mile down the meanders of the stream, though rather wide of the mark, is nearer to "about three quarters of a mile" than a mile and a quarter is. And when we come to the quantity, twelve acres is a wild guess, if we consider twenty-five acres to be the actual quantity; but what shall we say to it if the real quantity intended to be taken in was three hundred and forty acres? The quantity of "twelve acres, be the same more or less," must have been specified for some purpose. Adding the words "more or less," shows that there was only an intent to make a proximate estimate of the quantity. The parties evidently intended to state about what they supposed the quantity embraced within the specified boundaries would be. But it is inconceivable that they should have specified the quantity to be "twelve acres, more or less," if the boundaries which they intended to indicate really embraced three hundred and forty acres. Besides, the natural and obvious construction would be to take the first fence answering the calls of the deed which one would come

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to in following the meanders of the stream. The first fence does answer the calls even better than the second. The evidence shows a third wire fence about a mile beyond the second. Why not claim to that? The Court, it seems to us, could have come to no other rational conclusion upon the evidence, even without the testimony admitted under exceptions.

Interest on interest after it falls due.

The only remaining question is as to the interest. The note was for fifteen thousand dollars and interest at one and a per cent per month; "said interest to be due and payable at the end of every six months." The interest was not paid as it fell due, and the plaintiff claims that he is entitled, under the first section of the statute relating to the subject, to interest on each instalment of interest from the time it fell due, by the terms of the contract, till paid, at the rate of ten per cent per annum. If section one contained the only provision upon the subject, there would be great force in the position taken by the appellant, and—although there is some conflict on the point—the authorities greatly preponderate in his favor. (1 Aik. 410; *Catlin v. Lyman*, 16 Vt. 46; *Austin v. Imus*, 23 Vt. 286; *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 Mass. 221; *Kennon v. Dickens*, 1 Taylor, 235; *Gibbes v. Chisholm*, 2 Nott & McCord, 38; *O'Neal v. Sims*, 1 Strob. 116; *Id.* 429; *Pierce v. Rowe*, 1 N. H. 179; *Talliaferro v. King*, 9 Dana, 331, and other cases pro and con; 1 Am. Lead. Cases, 522.)

But the third section of the statute, authorizing parties to contract in writing for interest upon interest in default of punctual payment, also bears upon the question. And this section has already been construed by our predecessors to exclude interest after it falls due, unless expressly so agreed in writing. (*Montgomery v. Tutt*, 11 Cal. 316.) The question in that case was precisely similar in principle to the one now under consideration.

The judgment must be affirmed, and it is so ordered.

W. H. BLOOD v. THOMAS SHANNON.

PRINCIPAL AND ATTORNEY IN FACT.—One who has given to another a power of attorney to sell his real estate, may sell the same, notwithstanding the execution of the power, provided he does so before the attorney acts under the power.

SALE BY ATTORNEY IN FACT AND PAYMENT FOR HIS SERVICES.—S. gave B. a power of attorney to sell his real estate for a sum certain in gold coin, provided he did so within fifteen days, and agreed to give ten per cent for making the sale. Two days thereafter, B. made the sale, and received a bank check for the price. S. refused to ratify the sale, because he had previously sold the property. *Held*, that S. not having objected to the sale by B. because he did not receive the money, was liable for the ten per cent. *Held*, further, that S. should have objected to the mode of payment before it was too late to obviate it.

APPEAL from the District Court, Second Judicial District, Plumas County.

The facts are stated in the opinion of the Court.

J. W. Coffroth, for Appellant.

H. H. Hartley, for Respondent.

By the Court, CURREY, C. J.

The defendant, being the owner of an undivided interest in certain real property in Plumas County, appointed and by deed constituted the plaintiff his true and lawful attorney, with authority to bargain, sell and convey the same for and in the name of the defendant, for the sum of eighteen thousand dollars in United States gold coin. The deed granting this power to the plaintiff was dated the 17th of August, 1864. The power granted was to continue irrevocable for fifteen days from that date. On the nineteenth of the same month the plaintiff, as the Court found, "consummated the sale of the property for the sum of eighteen thousand dollars to one John Center, of the City and County of San Francisco, payable in gold coin." On the day the sale was made the plaintiff executed to the purchaser a deed for the property; and three days thereafter he informed the defendant of what he had done, upon which the defendant stated in substance, that notwith-

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standing the plaintiff had the right to make the sale, he, the defendant, also had the right to sell, and had exercised such right, and sold the property for eighteen thousand five hundred dollars. The plaintiff then demanded of the defendant a commission of ten per cent on the eighteen thousand dollars for which he had sold the property to Center. The defendant refused to pay the amount demanded or any portion of it. The plaintiff afterward brought his action to recover such commission, amounting to one thousand eight hundred dollars. The case was tried by the Court without a jury and judgment was rendered for the plaintiff for the sum demanded and costs. This judgment the defendant sought to have set aside on a motion for a new trial, on the grounds:

First — That instead of the plaintiff's selling the property for eighteen thousand dollars cash in hand, he sold the same for said sum and took the purchaser's check on a San Francisco bank in payment therefor, without authority so to do.

Second — That the finding of the Court was contrary to the evidence.

The motion for a new trial was denied, and the same objections are urged on appeal as demanding a reversal of the judgment. Other objections were made on the motion for a new trial, but the record does not set forth the facts and circumstances on which they were founded, and hence no further notice will be taken of them.

I. The power conferred on the plaintiff was to sell the property within fifteen days from the date of the power of attorney for eighteen thousand dollars, in gold coin. Under this power the plaintiff was not authorized to sell on a credit or on any other terms than for gold coin. The plaintiff testified that he did not receive the gold coin for which he sold the property, but that the purchaser gave him a check for the amount, which was good for the money on presentation. When informed of the sale made by the plaintiff, and that he had the purchaser's check for the money, the defendant made no objection on that ground, but he said he could not give Center possession of the property because he had already sold it, which he maintained

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he had a right to do. Having sold the property to another, the objection to giving Center possession was a valid one, and rendered it unnecessary on the part of the plaintiff to procure the money on the check and to tender it to the defendant. Had the defendant refused the check on the ground that it was not the money for which the property had been sold to Center, the plaintiff could have obtained the money within the fifteen days given him to effect the sale. Not having objected to the mode of payment at the time, it would not be just to allow the defendant to raise the objection after it was too late to obviate it.

II. The finding, we think, was sustained by the evidence. The defendant agreed to pay plaintiff ten per cent on the sum of eighteen thousand dollars, provided he made a sale of the property for that sum. The power granted to plaintiff was to continue for fifteen days. On the faith of the contract between the parties the plaintiff rendered his services by effecting a sale for the price specified. He was employed for the purpose of performing this service, and having performed it, he was entitled to the compensation which the defendant agreed to pay him therefor. (*Middleton v. Findla*, 25 Cal. 76.)

The judgment is affirmed.

Ex parte D. O. McCARTHY.

AID OF COUNSEL TO WITNESS BEFORE LEGISLATURE.— A legislative assembly may refuse to a party summoned before it as a witness the aid of counsel when charged with contempt in not answering questions.

COMMITTEE OF A LEGISLATIVE BODY.— The appointment of a committee by the Senate, with power to investigate charges of bribery made against members of that body, does not preclude the Senate from afterwards summoning the witnesses, and making the investigation before the bar of the Senate.

WHAT CONSTITUTES AN ISSUE WITHIN THE STATUTE AGAINST PERJURY.— When charges of bribery are made by any person against members of either branch of the Legislature, without giving their names, and a resolution is adopted by the branch to which the members accused are said to belong, reciting the charge, and resolving to investigate it, and witnesses are summoned before it, an issue is made up within the meaning of the statute against perjury.

Opinion of the Court — SANDERSON, J.

POWER OF A STATE LEGISLATURE.—A State Constitution is not a grant, but restriction upon the powers of the Legislature, and hence, an express enumeration of legislative powers is not an exclusion of others not named, unless accompanied by negative terms.

POWERS AND PRIVILEGES OF A LEGISLATIVE ASSEMBLY.—A legislative assembly has all the powers and privileges which are necessary to the proper exercise, in all respects, of its appropriate functions.

SOURCE OF SAME.—Such powers and privileges are inherent in a legislative body, and are to be ascertained primarily by a reference to the common parliamentary law.

SAME.—A legislative assembly has all the powers and privileges conferred by the common parliamentary law unless restrained by some express provision of the Constitution, or some express law made unto itself.

POWER OF LEGISLATURE TO SUMMON WITNESSES.—By the common parliamentary law a legislative assembly may compel the attendance of all persons within the limits of their constituency, as witnesses, in regard to subjects on which they have power to act, and into which they institute an investigation.

EXAMINATION OF WITNESSES BEFORE LEGISLATIVE ASSEMBLY.—Witnesses before a legislative assembly or its committee are not sworn, unless there is some provision of law or of the Constitution authorizing it, but give their testimony under the penalty of being adjudged guilty of contempt, and punished, if they testify falsely.

MANNER OF COMPELLING WITNESSES TO TESTIFY BEFORE LEGISLATURE.—When witnesses are brought before either branch of the Legislature, they may be compelled to testify by process of contempt, when without legal cause they refuse to do so.

WITNESSES REFUSING TO TESTIFY BEFORE THE LEGISLATURE.—When a charge of bribery is brought against members of the Senate, the Senate has power to investigate the charge, and to summon the person making the charge before its bar as a witness touching the same, and to commit him for contempt for refusing to testify without sufficient legal cause.

THE case was argued before Mr. Chief Justice CURREY, Mr. Justice SAWYER, and Mr. Justice SANDERSON.

The facts are stated in the opinion.

J. W. Coffroth, and *J. C. Goods*, for Petitioner.

J. G. McCullough, Attorney-General, and *N. Greene Curtis*, against his discharge.

Opinion by SANDERSON, J.

In his petition for a writ of *habeas corpus* the petitioner, D. O. McCarthy, substantially states that he is illegally imprisoned and restrained of his liberty by confinement in the County Jail of Sacramento County, under the control of one

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James McClatchy, Sheriff of said county; that he is not so imprisoned by virtue of the final judgment or decree of any Court or Judge of the United States or of this State; that he is so confined by virtue of an illegal order or warrant issued by the Senate of the State of California, in a case in which said Senate had no jurisdiction under the Constitution, nor by virtue of any law made in pursuance thereof.

The proceedings which led to the imprisonment of the petitioner, as appears from the return of the Sheriff to the writ and from the Journal of the Senate, which, by mutual consent, was referred to at the hearing, and treated in effect as a part of the return, were instituted under the circumstances and conducted in the manner following:

On the 17th of February, 1866, an article appeared in a newspaper, published at San Francisco, called the *Daily American Flag*, of which the petitioner was the reputed editor and proprietor, charging in effect that seven members of the Senate, not named, had each received the sum of twelve thousand dollars for voting against the repeal of the so called Specific Contract Act; and that the sum of twenty-four thousand dollars had been divided among the members of the lobby as compensation for their services in effecting the arrangement. On the 19th of the same month, the Senate being in session at Sacramento, the Capital of the State, C. B. Porter, Senator from the Counties of Contra Costa and Marin, offered a preamble and resolution, which was subsequently adopted, reciting the article in question, and providing for the appointment of a committee to investigate the charges therein contained, with the usual power to send for persons and papers. On the 21st of February, Senator Ewer, one of the members of the committee so appointed, offered a resolution authorizing the committee to proceed to San Francisco for the purpose of investigating the charges of corruption and bribery aforesaid, and granting them indefinite leave of absence for that purpose. A substitute was offered by Senator Hale, and finally adopted, to the effect that the petitioner be immediately summoned to appear forthwith at the bar of the Senate,

then and there to testify as a witness touching the charges aforesaid. Shortly thereafter the petitioner appeared at the bar of the Senate, and Senators Belden and Heacock were appointed by the Senate as managers to conduct his examination. Without going further into detail, it is sufficient for the present purpose to say that the petitioner, in response to questions put by the managers, stated that he was the editor and proprietor of the *Daily American Flag*, and was responsible from the printed matter appearing in its columns; and that the article containing the charges in question, though not written by him, was written by his direction and had his approval before publication. Thereafter the petitioner refused to answer any further questions, for reasons stated by him in a written communication presented to the Senate, wherein he professed a desire for a full investigation as to the truth of the charges contained in the article in question, and a willingness on his part to lay before the Senate all the information upon the subject in his possession; but that in his judgment to do so in the manner proposed might defeat the object which he had in view, by affording the guilty parties an opportunity to escape, and the witnesses against them an opportunity to avoid an appearance; and suggesting that to allow the committee already appointed to proceed with the investigation would be a more judicious mode of ascertaining the truth or the falsity of the charges in question. Nevertheless the Senate determined to proceed with the investigation, and the petitioner was asked a series of questions pertinent to the subject matter before the Senate, and was directed by the President pro tem of the Senate to answer the same. In response to each question, when put, the petitioner said: "I decline to answer," or "I decline to answer at this time." Thereupon a preamble and resolution was offered by the Senator from Nevada (Mr. Kutz,) reciting the contumacy of the petitioner, and adjudging him guilty of contempt, and directing that he be committed to the County Jail of Sacramento County until he shall have purged himself of his contempt by answering the questions which had been propounded to him under the direction

of the Senate; which was adopted, and accordingly the commitment under which the Sheriff now holds him in custody was made out under the style of "The People of the State of California," as provided in the Constitution, signed by the President pro tem, and attested by the Secretary of the Senate.

Right of witness before the Legislature to aid of counsel.

At times during the progress of the argument, counsel, unintentionally doubtless, seemed to assume that the petitioner was summoned to the bar of the Senate upon a charge of libel against that body, and was, to some extent at least, on his trial upon a charge of that character. Such a theory, however, is wholly unauthorized by the facts of the case as disclosed by the record before us. At the time the alleged contempt was committed, the Senate was acting under the resolution of the Senator from Placer, (Mr. Hale,) which was, as already stated, to the effect that the petitioner be summoned to the bar of the Senate to testify as a witness touching the charges of corruption against unknown members of that body. Moreover the tenor of the questions put to the petitioner shows clearly that the Senate was seeking to ascertain whether any members of that body had been bribed to vote in a particular way, and if so, who those members were. Hence the petitioner did not stand before the Senate accused of any offense, but as an accuser of other persons against whom charges of bribery and corruption had been indirectly if not directly made by himself. His real attitude was that of a witness. And we may here remark that that fact alone is a complete answer to all that was said at the argument touching the refusal of the Senate to allow him counsel, and fully explains and justifies the conduct of the Senate in that respect, and relieves it from all just criticism on the score that the course pursued was unusual and arbitrary. But were it otherwise we could afford no relief. In this respect *In re Falvey and Kilbourn v. Massing*, 7 Wisconsin, 630, is on all fours with the present case. There Falvey had been adjudged

guilty of contempt by the Assembly in refusing to answer questions put to him by a joint committee of both Houses, and committed. The aid of counsel had been denied him, yet the Supreme Court of that State, on habeas corpus said, (p. 639): "Another objection taken to the commitment is, that the petitioner prayed to be heard by counsel in answer to the charge of contempt, and that this request was denied by the Assembly. The Assembly in refusing to hear the petitioner by counsel before adjudging him in contempt might have acted arbitrarily and improperly. Concede that it did, and yet it was a matter resting solely in the discretion of that body. And as the jurisdiction of the Assembly, acting in this matter, was final, the Court having no appellate power over it, it is not competent for us to revise the proceedings of the Assembly, or suspend its judgment because it has made a mistake or abused its discretion in the premises." (See, also, the case of *Brass Crosby*, 3 Wilson, 188; and *Ex parte Kearney* 7 Wheaton, 38.)

Before going generally into the question of power, it is proper to notice briefly and in their order certain points bearing in some degree upon that question made by counsel for the petitioner at the argument. While both counsel for the petitioner agreed and claimed broadly that the Senate was powerless to act at all in the premises, and could not, therefore, lawfully inquire in any mode into the truth or falsity of the charges for any purpose, yet, while admitting for the sake of the argument, that under proper circumstances and upon proper conditions the Senate might have power to institute and prosecute to some final result an inquiry into the matter in question, they each assigned different reasons why, in their judgment, under the peculiar conditions of the present case, the power did not exist. Mr. Coffroth claimed, as we understood him, that although as a general proposition the Senate might have had jurisdiction, yet at the time of this investigation it had no jurisdiction because of the previous appointment of a committee with power to investigate and report, and such committee had not yet reported, nor had it been formally dis-

charged from the further performance of the duty for which it was created. Mr. Goods, however, grounded the point in question upon the fact, as he claimed, that there was not at the time a material issue before the Senate as to which the petitioner would have committed perjury had he testified and knowingly testified falsely, which is undoubtedly a very good test as to whether there was a material issue.

Repugnant resolutions of legislative assembly.

To the point made by Mr. Coffroth there are at least two answers: first, the point made is not of jurisdictional consequence. It does not rise above the level of a mere irregularity which would not, however gross, vitiate the final judgment of the Senate; and second, the resolution of Senator Hale was so repugnant to the previous resolution of Senator Porter, so far as the appointment of the committee was concerned, as to virtually repeal and annul it, or at least to suspend the power of the committee, in analogy to the rule that a statute operates as a repeal of a former statute to which it is repugnant.

Material issue within statute against perjury.

The point made by Mr. Goods in this connection presents the question whether there was at the time a material matter, or issue, or point in question before the Senate within the meaning of the statute against perjury. There was not, perhaps, any issue in the sense in which the Courts employ that word when speaking technically in the language of the law as applied to pleadings in either civil or criminal actions. There was no complaint, no indictment, no answer and no plea, yet there was in our judgment a material issue or point in question within the meaning of the statute against perjury, sufficient to sustain an indictment. The matter contained in the resolution of Senator Porter was before the Senate, and the question or point in issue was whether the charges therein contained were true, and, if true who were the guilty Senators. That all this amounted to an issue within the meaning

of the statute against perjury, may be illustrated by a reference to proceedings pending before a grand jury, between which and those under review there is, in our judgment, a perfect analogy. It is the duty of a grand jury to inquire into all public offenses which are brought to their notice, and if, after an investigation of the charge by an examination of witnesses, they find that an offense has been committed, to present the same by indictment or otherwise to the Court, in order that the party accused may be tried according to the forms of law. Suppose, then, that some member of the jury, in the mode adopted by Senator Porter in this case, should suggest that he had information that a certain offense had been committed, and that a certain person professed to have information which might lead to the detection of the guilty parties, and suppose that thereupon such person should be summoned before the grand jury to testify as a witness touching such alleged offense. Can there be any doubt but that there would be an issue before the grand jury within the meaning of the statute against perjury? We think not. As was said by the Supreme Court of Massachusetts in *Burnham v. Morrissey*, 14 Gray, 239, the Legislature is the grand inquest of the Commonwealth. As such, it has the power to inquire into the conduct of the officers of the State, with a view to their impeachment if they find any cause therefor. It may inquire into the election and qualification of its own members, with a view to their admission or expulsion. It may inquire into a variety of matters, with a view to apt legislation. Such inquiries may be inaugurated by any mode which may be thought most practicable or convenient—the mode is immaterial. Whenever it is proposed to institute an inquiry touching any matter of public concern within their jurisdiction, by any mode which they may choose to adopt, there is, to every legal intent, a material issue presented touching which witnesses may be examined and subject themselves, by testimony wilfully false, to all the pains and penalties of perjury:

Having disposed of the foregoing collateral questions, we now come to the consideration of the main proposition.

Power of Senate to investigate charges of bribery against its members.

Had the Senate the power or jurisdiction to investigate the charges of bribery in question for any purpose?

We shall first consider this question by the light of the common parliamentary law, independent of any restrictions placed thereon by the Constitution or any laws made in pursuance thereof.

A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation. The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. A legislative assembly has, therefore, all the powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same. (Cushing's Law and Practice of Legislative Assemblies, p. 221.)

☆ What powers and privileges, therefore, a legislative assembly takes by force and effect of its creation, are to be ascertained by a reference to the common parliamentary law. These powers and privileges are classified by Cushing (p. 246) as follows:

1. To judge of the returns, elections and qualifications of its own members.
2. To choose its own officers and remove them at pleasure.
3. To establish its own rules of proceeding.

4. To have the attendance and service of its own members.
5. To be secret in its proceedings and debates.
6. *To preserve its own honor, dignity, purity and efficiency, by the expulsion of an unworthy, or the discharge of an incompetent member.*
7. To protect itself and its members from personal violence.
8. To protect itself and its members from libellous and slanderous attacks.
9. *To protect itself and its members from corruption.*
10. To require information touching public affairs, from the public officers.
11. To require the opinion of the Judges and other law officers on important occasions.
12. *To investigate, by the testimony of witnesses or otherwise, any subject or matter, in reference to which it has power to act; and, consequently, to protect parties, witnesses and counsel, in their attendance, when summoned, or having occasion to attend for that purpose.*
13. To be free from all interference of the other co-ordinate branch, and of the executive and judicial departments, in its proceedings on any matter depending before it.

Speaking at page two hundred and fifty, of the sixth of the foregoing subdivisions, the learned author says: "The power to expel a member is naturally and even necessarily incidental to all aggregate, and especially all legislative bodies, which, without such power, could not exist honorably and fulfil the object of their creation."

At page two hundred and fifty-one he speaks thus of the eighth subdivision: "No form of attack upon the rights and privileges of a legislative assembly has been more common or subjected offenders to a severer punishment than this. When the libel is on the assembly itself there can be but little doubt of its authority to punish the offenders; but when it is committed against a member it can hardly be considered a breach of privilege, unless it attack him in that capacity or on account of something said or done by him as a member."

At page two hundred and fifty-three he speaks thus of the

twelfth subdivision touching the right of investigation: "It has always, at least practically, been considered the right of legislative assemblies to call upon and examine all persons within their jurisdiction as witnesses in regard to subjects in reference to which they have power to act, and into which they have already instituted or are about to institute an investigation. Hence they are authorized to summon and compel the attendance of all persons within the limits of their constituency as witnesses, and to bring with them papers and records, in the same manner as is practiced by Courts of law. When an assembly proceeds by means of a committee in the investigation of any subject the committee may be and usually is authorized by the assembly to send for persons, papers and records. Witnesses before a legislative assembly or committee are not sworn, unless there is some express provision of law or Constitution authorizing their examination in that manner; but they give their testimony under the penalty of being adjudged guilty of a contempt, and punished accordingly if they prevaricate or testify falsely."

Such are some of the powers and privileges of a legislative assembly under the law of its creation, or in other words, under the common parliamentary law. In their support we content ourselves with a citation of the following authorities: *Burdett v. Abbott*, 14 East. 138; *Burdett v. Coleman*, 14 East. 163; *Coffin v. Coffin*, 4 Mass. 35; *State v. Mathews*, 37 N. H. 453; *Burnham v. Morrissey*, 14 Gray, 241; *Kilbourn v. Messing*, 7 Wisconsin, 638; *Anderson v. Dunn*, 6 Wheaton, 204.

Thus by the common parliamentary law the Senate has the power, among other things, to judge of the qualifications of its own members, to preserve its own honor, dignity, purity and efficiency, by the expulsion of an unworthy or the discharge of an incompetent member; to protect itself and its members from corruption; and as necessary to the intelligent exercise of those powers they may summon and examine witnesses and compel them to testify by process of contempt, when without good cause they refuse to do so.

The charge that seven members of the Senate had been

Opinion of the Court — Sanderson, J.

bribed was a charge affecting the honor, dignity, purity and efficiency of that body; and the Senate therefore, under the common parliamentary law, had the power to investigate the charge with the view to the expulsion of the guilty members, if any such could be found, and to that end to summon the petitioner to the bar of the Senate to testify as a witness touching the same, and to commit him for contempt for refusing to testify without sufficient legal cause.

These powers of the Senate, under the common parliamentary law, are not trenched upon by the Constitution or any law made in pursuance thereof. On the contrary, so far as the Constitution and laws of the State treat of the subject, they but affirm and enlarge, so far as the present case is concerned, the common parliamentary law. The Constitution provides that "each House shall choose its own officers, and judge of the qualifications, elections and returns of its own members." (Sec. 8, Art. 4); that "each House shall determine the rules of its own proceedings, and may, with the concurrence of two thirds of all the members elected, expel a member." (Sec. 10, Art. 4.) By no provision of the Constitution is the Senate denied the power which they exercised in the present case. Thus unrestrained by the Constitution, the Legislature, on the 25th of March, 1857, passed an Act, entitled "An Act to enforce more effectually the attendance of witnesses on the summons of either House of the Legislature of this State, and to compel them to discover testimony" (Statutes 1857, p. 97); which entirely covers this case, so far as the power to commit the petitioner as for a contempt in refusing to testify is concerned. So far as this Act confers power to commit a contumacious witness, it but confirms, as we have already seen, the common parliamentary law. By the fifth section of that Act it is provided that "if any witness shall neglect or refuse to obey such summons" (previously provided for), "or appearing, shall neglect or refuse to testify to any matter touching the inquiry then before such committee, Senate or Assembly, the Senate or Assembly, as the case may be, shall and may, in addition to the pains and penalties

hereinbefore mentioned, by resolution entered on the journal, commit such witness as for contempt, and such witness shall be imprisoned until he shall comply with the order of the Senate, Assembly or committee, which imprisonment shall not be a bar to proceedings under the foregoing sections of this Act, and if such witness neglect or refuse to attend in obedience to summons, he may be arrested by the Sergeant-at-Arms and brought before the Senate or Assembly, as the case may be; provided, that the only warrant or authority necessary to authorize such arrest shall be a copy of a resolution of the Senate or Assembly, signed by the President of the Senate or Speaker of the Assembly, and countersigned by the Secretary or Clerk. Such resolution may be entered on the report of the committee."

Thus stands the law. And in conclusion we have only to add that in our judgment the power of the Senate to investigate the charges in question, to summon and examine the petitioner as a witness, and to commit him, as for contempt, for refusing to answer the questions propounded to him, does not admit of a doubt. In our judgment the Senate has in no respect exceeded its jurisdiction.

Certain points as to the sufficiency of the commitment and as to the place of confinement were made, but in our judgment they are not of sufficient importance to require special notice.

Let the petitioner be remanded.

JOHN WINTER v. JOHN STOCK.

DEED OF LAND TO L. B. & Co.—A conveyance of land to L. B. & Co. vests the legal title of the same in L. B. alone, and his deed will give to his grantee a good and valid title.

WARRANTY OF TITLE.—A covenant of the grantor, warranting the title of the land sold as "indisputable and satisfactory," is not broken if the title is good and valid.

WARRANTY OF TITLE IN A CONTRACT TO CONVEY.—W. entered into a contract in writing with S., agreeing to convey to him a lot of land, and in the contract warranted the title to be "indisputable and satisfactory, or no

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sale." S., at the same time, let W. have a sum of money on account of the purchase. *Held*, that if the title was good and valid, W. could not recover back the money from S.

OPINIONS OF A WITNESS AS EVIDENCE.—In the trial of an issue as to the validity of a title to land, the opinions of a witness respecting the title are not admissible in evidence.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

On the trial, plaintiff called as a witness the attorney who made an examination of the title for him, and asked him if, from the abstract and examination he made, he found the title satisfactory?

The defendant objected to the question, and the Court overruled the objection.

The other facts are stated in the opinion of the Court.

Sidney V. Smith, for Appellant, argued that the question whether the title was indisputable and satisfactory was one solely for the Court to pass on, and not to be arrived at from the opinions of witnesses, and cited *Lord v. Stevens*, 1 Young and Coll. Exch. R. 222; *Romilly v. James*, 6 Taunt. 263; and 24 Mo. 98. He also contended that the deeds to Louis Blanchard & Co., and Antoine Couttolene & Co. were, in law, merely deeds to Louis Blanchard and John Antoine Couttolene.

Brooks & Whitney, for Respondent, argued that the question at issue was not whether the defendant had title to the lot, but whether his title was *indisputable* and *satisfactory* and that if, upon an examination it appeared to the plaintiff that the title was doubtful, he might maintain the action.

By the Court, CURREY, C. J.

This action was brought to recover the sum of eight hundred dollars, paid by the plaintiff to the defendant on a contract for the purchase of a lot of land in the City of San Francisco. The contract between the parties was in writing, the concluding clause of which on the part of the defendant, the bargainer, is in these words: "I warrant an indisputable

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and satisfactory title, or no sale, and I have to pay the expenses for the examination of the title." The defendant's title was submitted to a lawyer for examination, who pronounced against it. From the original source to the defendant the title to the property had passed through several different persons. On the 7th of August, 1856, it appears that Etienne Louis Racouillat and Henry Racouillat owned the property, and on that day conveyed the same by deed to Louis Blanchard & Co. and John Antoine Couttolene & Co. On the 8th of August, 1857, Couttolene and Ernest Paris executed a deed of all their right, title and interest in and to the lot to Louis Blanchard & Co. In February, 1861, Blanchard and Francois Porta executed a deed of the lot to Edme Ludovic Racouillat, who afterward conveyed the lot to the defendant. Immediately after the title was pronounced defective, the plaintiff informed the defendant that the title was not of the character to satisfy the defendant's warranty, and at the same time demanded a return of the money deposited as a part of the purchase price of the premises. With this demand the defendant refused to comply, and thereupon this action was brought. The real issue between the parties was in respect to the validity of the defendant's title. The Court determined it against the defendant, and rendered a judgment in the plaintiff's favor for the sum of money demanded. From this judgment and an order refusing a new trial the defendant has appealed, and the question on which the case depends is as to the character of the defendant's title to the lot involved in this controversy. If it was upon the evidence "indisputable and satisfactory," or in other words a good and valid title, the plaintiff could not justly refuse to pay the purchase price, and thus perform his part of the contract, or, having paid it in whole or in part, he would not be entitled to recover back the money paid on account.

The objection made to the title, and which the Court below held well founded, was that the conveyance by the Racouillats was to Louis Blanchard & Co. and John Antoine Coutto-

lene & Co., and that the conveyance of the 8th of August, 1857, was by John Antoine Couttolene and Ernest Paris to Louis Blanchard & Co., and that the conveyance of February, 1861, was by Louis Blanchard and Francois Porta to Edme Ludovic Racouillat.

The fact that these several conveyances were made to certain persons whose names were mentioned with the words "and Company" annexed thereto, seemed to have been regarded as passing the title, not alone to the grantees named, but also to persons not named, but represented by the word "Company," and that the deeds of the persons thus represented were necessary to transfer the entire title of the property to a subsequent grantee; and that as "Company" was a word of indefinite and uncertain import, it could not be known to the purchaser that Paris and Porta were respectively members and the only members of the firms of Blanchard & Co. and Couttolene & Co.

The doctrine on this subject is well expounded in *Arthur v. Weston and Strode*, 22 Missouri, 378, in which case it appeared that in 1832 one Holcomb, from whom both parties claimed title, conveyed certain lots of land to W. W. Phelps & Co., and that in 1838 Phelps and Oliver Cowdry and John Whitmore conveyed the same lots to Arthur, the plaintiff. In the meantime, in 1835, the defendant Strode purchased the property and obtained a deed of the same under an execution sale, upon a judgment against Phelps and Cowdry. At the trial Arthur offered to prove that when the conveyance was made to Phelps & Co., "said firm was composed of Phelps, Cowdry and Whitmore;" but the Court rejected the offered evidence, holding the law to be that "the deed to W. W. Phelps & Co. operated to vest the legal title in W. W. Phelps alone, and that the entire title passed by the Sheriff's deed under the execution sale, and gave judgment accordingly." Upon writ of error the Supreme Court sustained the decision of the Court below, holding that the deed to W. W. Phelps & Co. did not take effect as a legal conveyance of the premises to Phelps, Cowdry and Whitmore jointly, but that it operated to convey

the property to Phelps alone. The Court observe that the question "is not merely whether the grantor intended to convey to the persons composing the firm, but whether the partnership style is, as a matter of law, a good name of purchase in a conveyance of real property sufficient to pass the legal title to all the individuals of the firm. * * * A conveyance of real property being required by the statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity, so far as it purports to effect a transfer of the legal title." The Court, in the case here referred to admit, upon authorities cited, that parties to a deed may be described by other modes than by their proper names — as a grant to the wife of a person named, or to the first son or second son or to all the children of a particular person who is specified, or to a person by his name of office, if there be no other person who can answer the description. In *Shepherd's Touchstone* (235, 236) it is said: "If the grant be by deed, the grantee must be sufficiently named, or at least set forth and distinguished by some circumstantial matter, and that he be so named or described as that he may be capable by that name whereby he is set forth;" and after giving examples of certain and definite description of grantees, without the use of their proper names, the learned author says: "But if the grant be made to the parishioners or inhabitants of Dale, or to the good men of Dale, or to the commoners of such a waste, or to the lord and his tenants, bond and free, these are not good grants; for, albeit these persons are capable, they are not capable by these means, for want of that identity or that certainty which the law will allow to be tried." A deed to a person by name "and Company," as to "Louis Blanchard & Co.," contains no certain designation or description of any other person than Louis Blanchard, for the reason that the word "Company" may describe one person as well as another. On this subject the following additional authorities may be consulted with profit: *Jackson v. Sisson*, 2 John. Cases, 321; *Jackson v.*

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Corey, 8 John. 385; *Hornbeck v. Westbrook*, 9 John. 73; *Gossett v. Kent*, 19 Ark. 607.

If the defendant's title to the lot was a good and valid title, as it appears to have been, without reference to any extrinsic evidence, the purchaser, as a reasonable man, should have been satisfied with it. The defendant's title to the lot being good and valid, it was, in the sense of the defendant's warranty, an indisputable title, and the plaintiff was in duty bound to be satisfied with it. A purchaser under such circumstances cannot, because he may have become tired of his bargain, or for any other insufficient cause, say he is dissatisfied and thus avoid his contract. In this case the purchaser may have supposed he had sufficient ground to decline consummating his contract, and to recover back the money paid on account of it, inasmuch as counsel learned in law advised that defendant's title was defective. But of the correctness of this advice he took the risk. The opinion of the person who passed upon the question, however reliable his opinions in general might be, was not conclusive of the parties' rights in the premises. The question presented for decision in the Court below was whether the defendant's title was good or bad. If it was good, the plaintiff was not entitled to recover back his deposit; if it was bad, he was entitled to the money that he had paid on account of it. We think upon the face of the record the defendant's title was "indisputable and satisfactory" in law, and that the Court erred in deciding otherwise. We also hold that it was erroneous to obtain from the witness his opinion respecting the title. Whether it was good or bad was the question, and the main question to be passed upon by the Court. (*Romilly v. James*, 6 Taunt. 274; *Kent v. Allen*, 24 Mo. 106.)

The judgment must be and is hereby reversed.

SAWYER, J., dissenting.

The question is not whether defendant could convey a good title, but whether he had "an indisputable and satisfactory title." Admitting that a conveyance to "Louis Blanchard &

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Company" conveyed the legal estate to Louis Blanchard alone, yet it is plain from the face of the deed that such was not the intention of the parties. If Blanchard took the legal title, it is simply because the description of the other parties intended to be grantees is indefinite and insufficient in law to identify them, and, for this reason alone, the legal estate failed to vest in them. But it appears upon the face of the deed, that other parties than Louis Blanchard were beneficiaries, and that he held the property upon some trust not fully disclosed by the instrument, and parties dealing with the property are put upon inquiry. At all events, there was a wide departure from the ordinary forms of conveyance, with a manifest defect on the face of the instrument, by which, at best, the rules of law vested the legal title in a party not intended to be the sole grantee, and a contest might, therefore, reasonably arise upon the title. The title was, in fact, rejected by an attorney, whose special business it was to pass upon titles to real estate, and even the defendant's counsel, on the trial of this case, was not satisfied with introducing his paper title to establish "an indisputable and satisfactory title;" for he himself went outside of his paper title to show who the members of the firm were, and that all the beneficiaries of the trust had conveyed. If he was not satisfied to rest on his paper title, what right has he to say that the plaintiff ought to be satisfied with it? I do not think a title thus liable to doubt can be regarded as "indisputable and satisfactory." Evidently the market value of the title, whether good in law or not, must be impaired by such irregularities and defects until its validity shall have been actually adjudicated. No title ought to be regarded as satisfactory which requires evidence *dehors* the record to establish its validity. I do not think the title is such as the plaintiff is bound to be satisfied with, or as he was required to accept under the very special covenant in his contract. If the plaintiff was bound to be satisfied with his title, I do not see why he would not be required to be satisfied with any title that should finally turn out upon litigation to be valid. The ques-

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tions in the cases cited in the prevailing opinion were not the same as those involved in this case.

THE PEOPLE v. A. RICHMOND.

ACTING UNDER CONTROL OF ANOTHER DOES NOT EXCUSE A LARCENY.—On a trial for larceny, it is not competent for the defendant to prove that he was under twenty-one years of age, for the purpose of showing that in committing the offense he was acting under the control of another.

SAME.—The command of a master to his servant, or principal to his agent, or parent to a child, will not justify a criminal act done in pursuance of it.

ERROR MUST BE CLEARLY SHOWN.—The record must clearly show error, and not leave it to be inferred from argument as to what the language of the record means.

APPEAL from the County Court, El Dorado County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

George E. Williams, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, J.

The defendant was convicted of grand larceny.

At the trial one of the defendant's witnesses was questioned by his counsel as to the age of the defendant at the time the alleged offense was committed. Thereupon the Court asked counsel "if the object of the question was to prove that the defendant was under age." Counsel replied "that his object was to show that defendant was to a certain extent under the control of his mother, and was acting under her direction, being under age." The District Attorney then objected to the question, which objection was sustained by the Court. It is claimed that the foregoing ruling was erroneous.

We understand the Court as asking counsel if his object was to prove the defendant under the age of fourteen years; and counsel as replying that his object was to show that the

defendant was to a certain extent under the control of his mother, and was acting under her direction, being under the age of twenty-one years. Such is the only conclusion that can be drawn from the language of the record. If the object of counsel was to prove that the defendant was under the age of fourteen, he should have so stated in terms not to be misapprehended. The record must affirmatively and clearly show error, and not leave it to be inferred from argument as to what the language of the record means. (*People v. Connor*, 17 Cal. 362.)

Had the object been to prove the defendant under the age of fourteen, the question would have been proper (section four of the Act concerning Crimes and Punishments,) but it was not competent to prove his age for the purpose stated. "The command of a superior to an inferior, as of a military officer to a subordinate, or of a parent to a child, will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent; but in all these cases the person doing the wrongful thing is guilty the same as though he had proceeded self-moved." (1 Bishop on Criminal Law, 275.)

Judgment affirmed.

Mr. Chief Justice CURREY expressed no opinion

THE PEOPLE *ex rel.* WILLIAM GROW v. A. M. ROSBOROUGH, COUNTY JUDGE OF SHASTA COUNTY.

PROCEEDINGS IN INSOLVENCY.—Since the adoption of the amendments to the Constitution in 1863, proceedings in insolvency have ceased to be "special cases" in the sense in which that phrase was applied to them before that time.

NEW TRIALS IN INSOLVENT CASES.—County Courts may grant new trials in insolvent cases.

STATEMENT IN INSOLVENT CASES.—It is the duty of the County Judge to settle a statement made on motion for a new trial in an insolvent case, and if he refuse, a writ of mandate will issue commanding him to do so.

APPEAL IN INSOLVENT CASE.—An appeal lies from a judgment in an insolvent case to the Supreme Court.

Opinion of the Court — Shafter, J.

THIS was an original proceeding commenced in the Supreme Court.

The other facts are stated in the opinion of the Court.

J. G. McCullough, for Petitioner, contended that petitioner was entitled to have his motion for a new trial heard, and cited Laws of 1863, p. 756; *Kohlman v. Wright*, 6 Cal. 230; *Fisk v. His Creditors*, 12 Cal. 281; and *San Francisco and San José Railroad Company v. Mahoney*, ante 112.

A. M. Rosborough, in *pro. per.*, for Defendant.

By the Court, SHAFER, J.

Petition for a mandamus to be directed to the defendant, commanding him to settle a statement, on motion for a new trial in *Grow v. His Creditors*.

It appears that Wetzell, one of the creditors, filed his written opposition to the petitioner's discharge, on the ground of fraud. The issue was tried by a jury, who found fraud as alleged. *Grow* moved for a new trial, for errors of law and on the ground that the verdict was not justified by the evidence. The Judge refused to settle a statement on new trial duly filed and submitted.

Proceedings in insolvency not "special cases."

Proceedings in insolvency are no longer to be regarded as "special cases," in the sense in which that phrase was applied to them prior to 1863, for by the amendments of the Constitution the jurisdiction became organic. To that extent the jurisdiction of the County Courts in insolvency rests upon the same foundation as the general jurisdiction of the District Courts, and that of the Supreme Court, both original and appellate.

We held, in *Dorsey v. Barry*, 24 Cal. 449, relied upon in argument, that the jurisdiction in contested election cases was special—a statute creation; that the proceedings were intended to be a summary, and that the subject matter made it

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essential that they should be so in order to make them of any avail, and that the special procedure was, withal, so complete in itself that it was manifestly the intention of the Legislature that the litigation should be kept to the method which the Act prescribed, and end where it ended; and, therefore, that that class of cases was not within the scope of the one hundred and ninety-third section of the Practice Act relating to new trials. But this reasoning has no application to proceedings in insolvency. The jurisdiction of the County Courts in insolvency is now, as has been remarked already, of constitutional significance. The proceedings under the statute, setting the jurisdiction in motion, are not intended to be summary or hurried, but are, at least so far as the trial of opposition is concerned, to be conducted according to the course of the common law in the main. Instead of its being necessary in the nature of the contest that judgment should be reached within a given interval, it is obvious that there is nothing to distinguish the controversy from litigation concerning property, or other personal interests at large.

Further, if County Courts cannot grant new trials in insolvency, it follows that they cannot do so in actions of forcible entry and detainer. The jurisdiction in both cases rests upon the same basis, and legislation in aid of the jurisdiction is in both equally complete and exhaustive. But that a new trial may be granted by a County Court in a forcible entry case is not open to controversy.

New trials in insolvent cases.

Power to grant new trials is conferred upon all the Courts referred to in the Practice Act; and wherever an appeal lies to this Court from an order granting or refusing to grant a new trial, it becomes the duty of the Judge to settle a correct statement properly presented. Under the Judiciary Act of 1863 we are authorized to review such orders when made in cases within the limits of our jurisdiction in error. It is true, as the respondent claims, that cases in insolvency are not "cases

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in equity," (*Cohen v. Barrett*, 5 Cal. 195,) nor do we consider that the jurisdiction in error can be supported as upon the "amount of the demand" nor as upon the "value of property in controversy." A petition in insolvency looks to a discharge as the principal purpose, and "oppositions" are interposed solely with a view to defeat it.

Were the question a new one, we might doubt our jurisdiction, but it has been settled by long and unbroken usage. The question is broadly within the reasoning in *Conant v. Conant*, 10 Cal. 249, and furthermore, it was directly decided in *Fisk v. His Creditors*, 12 Cal. 281. The argument in that case has been strengthened rather than weakened by the constitutional amendments.

The order is made absolute.

N. B. EDGERLY AND WM. WICKMAN v. SCHOONER
SAN LORENZO.

LIEN ON VESSEL FOR SUPPLIES.—If a credit is given for supplies and materials furnished a vessel, the lien of the person furnishing the same, for the price thereof, continues on the vessel for the period of one year from the time the demand falls due.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Plaintiffs were ship chandlers and dealers in ship and steamboat stores, and at the request of the master and owners of the San Lorenzo furnished the schooner materials, which were used in her construction, on a credit of six months. Plaintiffs recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant, contended that the giving of credit operated as an absolute abandonment of the lien which plaintiffs might otherwise have had, because such lien only existed by force of the statute, and the statute

Opinion of the Court — Sawyer, J.

did not provide that credit might be given and the lien be yet preserved, and cited *Emerson et al. v. Steamboat Shawnee City*, 10 Wisconsin, 434; *Newcomb v. Steamboat Clermont*, 3 Iowa, 295; and the case of the *General Smith*, 4 Wheat. 443.

Porter & Holladay, for Respondents, argued that the giving of credit to the vessel was not an abandonment of the lien, and that an abandonment of a lien could never be inferred unless the sale of the materials was made on the personal credit of the owners of the vessel, or third persons, or other collateral security, and that the plain meaning of the statute was that the lien continued one year from the time the plaintiffs had a right to commence suit.

By the Court, SAWYER, J.

Under section three hundred seventeen of the Practice Act, all steamers, vessels and boats are liable, among other things, for materials furnished for their construction, etc., and the several claims mentioned constitute liens upon the steamer, vessel or boat for which the materials are furnished and used, "provided such liens shall only continue in force for a period of one year from the time the cause of action accrued."

In this case the materials were furnished on a six months credit. The suit was commenced within a year after the credit expired, but not within a year after the materials were furnished, and the question is, whether the suit was brought before the lien expired? The solution depends upon the further question, when did the "cause of action" accrue within the meaning of these terms, as used in the statute? Clearly the party could not maintain an action till the term of credit fixed by the contract expired. Until that time he had no ground of complaint. Until a breach of the contract no cause of action existed. That a cause of action could not have accrued, or arisen till a cause of action had been in some mode brought into being, would seem to us to be too plain to admit of argument, had it not been held otherwise by the Supreme

Court of Wisconsin. To hold that a cause of action has accrued upon a contract in favor of a party before there has been a breach, and before he is entitled to commence an action, would seem to be a contradiction of terms. The first section of the Statute of Limitations provides, that "civil actions can only be commenced within the periods prescribed in this Act, after the cause of action shall have accrued," etc. Can there be any doubt as to what the clause "after the cause of action shall have accrued" means? Will it be pretended that a cause of action has accrued upon a note secured by a mortgage the moment it is executed, without reference to the time of payment? Such a proposition would be absurd. The bar of the statute might attach on that supposition before an action could be brought. The same language is used in the section of the Practice Act under consideration, and there is nothing in the provision which leads us to suppose that the terms are used in a sense different from their ordinary legal signification — or different from the sense in which they are used in the Statute of Limitations. If the language does not express the idea intended to be conveyed, it is the fault of the Legislature. We are unable to adopt the construction given by the Supreme Court of Wisconsin to a statute of similar import. The cause of action did not, in our opinion, accrue till the term of credit expired. The statute says nothing about credit, but says, that the vessel shall be liable, that the cause of action shall be a lien, and that the lien shall continue in force for a period of one year from the time the cause of action accrued; and it is not the province of the Court by strained construction to curtail the statutory right. If the Act produces inconvenience, the remedy is with the Legislature.

The judgment is affirmed.

THE PEOPLE v. SANTIAGO ROBLES.

CROSS EXAMINATION OF A WITNESS.—It is not irrelevant to inquire of a witness on cross examination, for the purpose of impeaching him, whether he has not on a former occasion given a different account of the matter.

WHEN ERROR OF COURT IMMATERIAL.—The error of refusing to allow a witness to be asked on cross examination whether he has not formerly made different statements from what he then does, is not cured because his testimony is corroborated by other witnesses.

JURISDICTION OF A LARCENY.—When property has been stolen in one county and carried into another, jurisdiction of the offense is in either county.

THE defendant was indicted in the County of Tuolumne for stealing a horse. The horse was stolen in Mariposa County, and taken into Tuolumne County, where the defendant was arrested. On the trial Mallet the prosecuting witness was asked, for the purpose of impeaching his testimony, if he did not testify differently before the committing magistrate from what he then did. The Court on the objection of the District Attorney refused to allow the question to be put.

The defendant was convicted and sentenced, and appealed.

Edwin A. Rodgers, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, J.

The Court below error in not permitting counsel for the defendant to examine the prosecutor Mallet on cross examination as to whether his testimony before the committing magistrate was the same as at the trial. It is never irrelevant to inquire of a witness whether he has not on some former occasion given a different account of the matter, for the purpose of impeaching his testimony by contradicting him. (1 Greenleaf on Evidence, Sec. 449.) It will not do to say that this error was immaterial because Mallet's testimony upon the point in question was corroborated by other witnesses, and that therefore the verdict would have been the same had his testimony been successfully impeached in the mode proposed. We cannot say what effect the successful impeach-

Points decided.

ment of his testimony might have had upon the minds of the jury; and it cannot be held that an error is immaterial unless it be made to appear beyond all controversy that it could have had no effect whatever upon the verdict prejudicial to the defendant.

The point made on the motion to arrest the judgment is answered by the ninety-second section of the Criminal Practice Act, which provides that when property has been feloniously taken in one county and brought into another, the jurisdiction of the offense shall be in either county.

We do not deem it necessary to notice the other points.

Judgment reversed and new trial ordered.

L. H. BAILEY v. WILLIAM P. TAAFFE, AND A. J. BRANNAN.

AFFIDAVIT TO SET ASIDE A JUDGMENT BY DEFAULT.—An affidavit on motion to vacate a judgment by default, under the sixty-eighth section of the Practice Act, must show — First, that the default occurred through mistake, inadvertence, surprise, or excusable neglect; and second, that the defendant has a meritorious defense.

ORDER SETTING ASIDE A JUDGMENT BY DEFAULT.—Although an order of the Court below, setting aside or refusing to set aside a judgment by default, rests much in the discretion of the Court, and will not be disturbed by the appellate Court unless plainly erroneous, yet the discretion of the Court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity with the law.

SETTING ASIDE A DEFAULT ON THE GROUND OF EXCUSABLE NEGLIGENCE.—A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town.

WHO SHOULD MAKE AFFIDAVIT TO SET ASIDE DEFAULT.—An affidavit, on motion to set aside a default, should be made by the defendant, unless good reasons exist for having it made by some one else.

SHOWING MERITORIOUS DEFENSE ON MOTION TO SET ASIDE DEFAULT.—An affidavit of the attorney, on motion to set aside a default, which states that from the examination of the defendant's case, so far as he has made such examination, he verily believes that it is better than the plaintiff's, does not show that the defendant has a meritorious defense.

DEFENDANT'S ANSWER SHOULD BE SHOWN TO COURT.—The better practice is to prepare and exhibit to the Court the defendant's answer at the hearing of a motion to set aside a default.

COSTS ON OPENING A DEFAULT.—When a judgment is vacated and a default opened, costs should be imposed as a condition.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The plaintiff appealed from an order of the Court below, setting aside a default.

The other facts are stated in the opinion of the Court.

Edward Tompkins, for Appellant, cited 17 Abbott, 44; 2 Hilton, 467; Id. 588; 5 Paige, 164; 6 Id. 371; 22 Howard, 477; 12 Cal. 445.

T. I. Bergen, for Respondents, cited 20 Cal. 140; *Rowland v. Kreyenhagen*, 18 Cal. 456; *Mulholland v. Heyneman*, 19 Cal. 606; *Haight v. Green*, 19 Cal. 117; *Barrett v. Graham*, 19 Cal. 635.

By the Court, SANDERSON, J.

This is an appeal from an order setting aside a judgment by default. It is claimed by appellant that the affidavit upon which the order was made is fatally deficient in the two essential particulars of excuse and merits. We are of the opinion that both points are well made.

An affidavit on motion to vacate a judgment under the sixty-eighth section of the Practice Act must show—First, that the default occurred through mistake, inadvertence, surprise or excusable neglect; and second, that the defendant has a meritorious defense to the action. If the affidavit is materially deficient in either of these respects, the judgment ought not to be vacated.

It is true, as claimed by the learned counsel for the respondents, that orders like the present, in legal parlance, rest very much in the discretion of the Court below, and will not be disturbed by this Court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion. (*Roland v. Kreyenhagen*, 18 Cal. 455; *Haight v. Green*, 19

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Cal. 113; *Mulholland v. Heyneman*, 19 Cal. 605; *Barrett v. Graham*, 19 Cal. 632; *Woodward v. Backus*, 20 Cal. 137; *People v. O'Connell*, 23 Cal. 281; *Howe et al. v. The Independent Consolidated Gold and Silver Mining Company*, 28 Cal. 72.)

The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other.

Affidavit on motion to set aside a default.

There is no pretense of mistake, inadvertence, or surprise in the affidavit in this case. The relief sought is asked solely on the score of excusable neglect; and upon that subject all that is said is in substance that on account of the complicated condition of the defendants' title, and from the fact that the complaint was verified, more time was required to prepare the answer than is required in ordinary cases, and that during a portion of the time allowed for answering, the attorney employed to conduct the defense was compelled to be absent from town. But so far as all this tends to establish a legal excuse, it is completely and conclusively answered by the fact that no reason is given why, if more time was required, either on account of the complications suggested, or on account of

the necessary absence of counsel, an application to opposite counsel, or if denied by him, to the Court, for an extension of time was not made. If there was any good reason for an extension, doubtless it could have been readily obtained from opposite counsel by stipulation. If not, it certainly could have been obtained from the Court by an order to that effect. There is, therefore, no pretense but that an extension of time could have been readily obtained from one source or the other had an application been made, and there is no pretense that an opportunity to make the application was, from any cause, not afforded. Moreover, no reason is given for the absence of counsel, except such as is implied from the general and vague statement that it was compulsory. Some men are compelled by the pursuit of pleasure, and others by the pursuit of business. The latter may, but not always, excuse absence and neglect of other duties, but the former, in the eye of the law, never does. In view of these facts, it cannot be said with any show of reason that the failure to answer in time is shown to have been excusable within the meaning of the law.

The affidavit is also manifestly insufficient on the question of merits. The affidavit is not made, as it should have been, by the defendant, but by his counsel, who does not state that he knows what the defense is, and that, in his opinion, it is a substantial one, but, on the contrary, contents himself with saying that from the examination of the defendant's title, so far as he has made such examination, he verily believes that it is better than the plaintiff's. Whether he knows anything about the plaintiff's title is not stated. Whether the examination made of the defendant's title was very elaborate or very meager is likewise not stated. Nor is it stated that the defendant has "fully and fairly" stated his whole case to him, and, in view of such statement, what his professional opinion is touching the defense. It is true, however, that this latter defect, if indeed it may be called such, is followed by no serious consequences, for had the matter in question been inserted

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in the affidavit it would have been but hearsay, and therefore entitled to no weight.

Had the affidavit been made by the defendant, and had it been stated therein that he had fully and fairly exhibited and made known his defense to counsel, and been advised by him that he had a meritorious defense, it would have been, under the rule in *Woodward v. Backus*, *supra*, sufficient upon the question of merits. But the affidavit was not made by him, and no reason is given why it was not.

Exhibition of answer on motion to set aside default.

Nor was the answer of the defendant, which he proposed or desired to make, prepared and exhibited to the Court, as it ought to have been, at the time the motion was made. We do not mean, however, to say that this latter step is absolutely necessary under our system. We design merely to suggest that such is the better practice, and is in accordance with the practice in Courts of Equity under the old system. Under that practice a defendant who asked to open a default was required to exhibit his sworn answer, or state fully in his affidavit the nature of his defense and his belief in its truth. (*Wells v. Cruger*, 5 Paige, 164; *Hunt v. Wallis*, 6 Paige, 371.)

Counter affidavit on motion to set aside default.

But in addition to these obvious defects in the defendant's affidavit we are satisfied from the counter affidavit of the plaintiff that the order in this case has been improperly made. From that affidavit, which is entirely uncontradicted, it appears that the plaintiff had been in the uninterrupted and peaceable possession of the premises in controversy for more than eight years. That he had the premises fenced, and had a dwelling house thereon, and that he had resided therein a number of years himself, and during the residue of the time he had occupied it by his tenant. That in his absence and without his knowledge or consent the defendant, being the claimant of adjoining lands, removed his fences and entered upon

Argument for Relator.

the land without pretending to have acquired the same by purchase or otherwise from any person holding or claiming a right thereto.

These facts, taken in connection with the absence of any satisfactory showing of merits on the part of the defendant, satisfy us that the order opening the default ought to be reversed. There was also error in not imposing the payment of costs as a condition. (*Howe & Simpson v. The Independent Consolidated Gold and Silver Mining Company*, 28 Cal. 72.)

Order reversed.

[NOTE.—That no injustice may be done to the learned Judge who made the order reversed in this case, I am authorised to say, that in consequence of his former connection with the subject matter of the litigation, the District Judge considered himself disqualified from making the order vacated; that at the time the default was entered he was not aware of his having been in any way connected with the subject matter in the suit, and as soon as it was suggested to him, the default was set aside on that ground alone, without reference to the merits of the motion as disclosed by the affidavits upon which it was based. But the grounds upon which the default was opened did not appear in the record on appeal.—REPORTER.]

THE PEOPLE *ex rel.* W. H. BLOOD v. A. P. MOORE,
COUNTY JUDGE OF PLUMAS COUNTY.

NUISANCES.—The County Courts have original jurisdiction of actions to prevent or abate a nuisance.

ACTION TO ABATE A NUISANCE.—An action to abate a nuisance is "a case in equity," and from judgment rendered in it an appeal lies to the Supreme Court.

WRIT OF MANDATE.—A writ of mandate will not be issued by the Supreme Court to a County Judge commanding him to recall an order made after final judgment, from which order an appeal could have been taken.

The facts are stated in the opinion of the Court.

H. H. Hartley, for Relator.

The order asked for was not what could technically have been considered as an order after judgment in the sense used by the statute; that only refers to orders in the main action or proceeding which the Court could make pending the appeal, and which directly modified or affected the principal judgment or order.

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Creed Haymond, and J. D. Goodwin, for Defendant.

The judgment of the County Court of Plumas County, in the case of *Light v. Blood*, is final. (Section 4, Art. VI of Constitution; Section 6, Art. VI, Id; Section 8, Art. VI, Id; Section 359 of Practice Act; *Middleton v. Gould*, 5 Cal. 190.) If, however, an appeal lies from that judgment, then the order herein complained of by relator was also appealable, and his remedy ample. (*Gilman v. Contra Costa*, 8 Cal. 52.)

By the Court, SHAFER, J.

One Light filed a bill in the County Court of Plumas County against the defendant for the purpose of abating an alleged nuisance and for damages. Judgment was entered in due course of proceedings, granting the equitable relief prayed for and damages to the amount of fifty dollars, and costs of suit taxed at three hundred and ninety-three dollars and eighty-five cents. A new trial was denied, on motion therefor, and the defendant, on the 1st of February, 1865, filed and served a notice of appeal from the order and judgment, and a statutory bond was filed within five days thereafter. Subsequently the County Judge, on the relator's motion, made an order staying proceedings on the judgment pending the appeal, on condition that the relator should file an additional bond in the sum of two thousand dollars. The relator complied with the order. The Clerk thereafter, by the direction of the Judge, issued to the Sheriff a copy of the judgment, together with an order to proceed and abate the nuisance. The relator, before any action on the part of the Sheriff, appeared before the Judge and exhibited to him the several undertakings, and moved for an order directing the Sheriff to return the papers into Court, and moved the Court also to approve the stay bond or to fix the penalty of a new one, to be filed as a substitute. Both motions were denied, for the Judge considered that there could be no stay in the case. On these facts we are asked to issue a mandamus to the County Judge, commanding him to recall

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the order issued to the Sheriff and to enter a stay of proceedings.

Under the late amendments to the Constitution, County Courts have original jurisdiction of actions to prevent or abate a nuisance. A suit of that character is "a case in equity," and is therefore within the appellate jurisdiction of the Court. By the Judiciary Act of 1863, we may, amongst other things, review any order made after final judgment in any case to which our jurisdiction in error extends. The order of the County Court refusing the stay of proceedings, and its order refusing to recall the process directing the nuisance to be abated, were both made after final judgment, and could have been brought to this Court for review by appeal had the party seen fit to use that remedy. The result is that the application for a mandamus must be denied.

And it is so ordered.

THE PEOPLE v. MARK A. EVANS *et al.*

APPROVAL OF OFFICIAL BONDS.—The Board of Supervisors of a county, after the passage of the Act of March 20th, 1855, became the body authorized by law to approve of the official bonds of County Treasurers.

DISCHARGE OF SURETIES ON OFFICIAL BOND.—The sureties on the official bond of a County Treasurer can be discharged from further obligation on the same only upon proceedings had before the Board or officer which, at the time of the discharge, has power to approve of the official bond of such officer.

OFFICIAL BOND OF COUNTY TREASURER.—A County Judge in 1861 had no jurisdiction to discharge the sureties on the official bond of a County Treasurer, or to approve of a new bond.

LIABILITY OF SURETIES ON OFFICIAL BOND.—The sureties on an official bond are liable under the statute, notwithstanding it was approved by the wrong officer or Board.

JUDGMENT IN SUIT ON JOINT AND SEVERAL BOND.—In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

Argument for Respondents.

The bond sued on was joint and several. There were four of the defendants who were not served with summons. The defendants served moved the Court to direct plaintiff to procure service on those not served. This the Court refused to do. The District Attorney suggested the death of two of the defendants who had been served, and moved for judgment of discontinuance against them, which motion the Court granted. The defendants served, then moved for a judgment of discontinuance as to all the defendants, which the Court denied.

Plaintiff recovered judgment against the other defendants served with process, and the defendants appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellants, contended that the sureties on the old bond were discharged from their liability by the reception and approval of the new bond by the County Judge, and cited *Averill v. Lyman*, 18 Pick. 346; *Goodman v. Smith*, 18 Pick. 416; *Canegie v. Morrison*, 2 Metcalf, 381; *Wiggins v. Tudor*, 23 Pick. 434; *Crane v. Alling*, 3 Greenleaf, 423; *United States v. Thompson*, 1 Gilpin, 614; 7 Vermont, 324; 7 Johnson, 207; 3 Denio, 238; 1 Gilman, 409; 7 Blackford, 27. He also contended that the State had elected to treat the bond as joint by suing all parties on it, and cited 4 Pike, 509; 3 Cowen, 374; 6 Cal. 183; 2 Scammon, 36, 571; and that it was error to force the defendants served into trial, before all the defendants had been served.

J. G. McCullough, Attorney-General, for Respondents, argued that the County Judge had no power to discharge the sureties on an official bond of the Treasurer, nor to approve of a new bond, and cited *People v. Breyfogle*, 17 Cal. 509. He also contended that the bond being joint and several, the State might sue one or all or any intermediate number of the sureties, and that in suing all it was not bound to wait until all were served, and cited Practice Act, Secs. 15, 32, 146, 148; *People v. Love*, 25 Cal. 526-531; *Reed v. Calderwood*, 22 Cal. 465; and *People v. Jenkins*, 17 Cal. 503.

By the Court, SAWYER, J.

This is an action upon the official bond of the defendant, Mark A. Evans, to recover the balance of moneys which came into his hands as Treasurer of San Joaquin County, and which have not been paid over. Defendant, Evans, having been elected Treasurer of said county, and having qualified by taking the proper oath and filing the bond in such cases required, entered upon the duties of his office on the first Monday of October, 1859, and served the full term of two years. The bond was approved by the County Judge of San Joaquin County. On the 22d of July, 1861, L. R. Bradley, one of the sureties, gave written notice to the County Judge, who had approved the bond, that he desired to withdraw as surety, and be released from all liabilities that might thereafter arise, on the ground that he was afraid of sustaining loss if he remained longer on the bond. The notice was addressed to, and marked filed by, the County Judge, and also by "Edw. M. Howison, Clerk," and a copy served on defendant, Evans, the principal on the bond. Thereupon said Evans presented another bond with additional sureties, which was indorsed approved by the County Judge, and filed July 27th, 1861. There was no formal order discharging the sureties on the original bond. Appellants claim — and for the purposes of the decision it will be assumed to be true — that the evidence shows a settlement of Evans' accounts to have been made on the twenty-second of August — subsequent to the filing of the second bond.

The Court found defendant, Evans, to have been a defaulter at the expiration of his term of office, for the full amount claimed, and that the sum unpaid became due on the seventh of October, 1861. Judgment was accordingly entered against the appellants as sureties on the original bond. The principal question is, whether the sureties on the bond in suit were discharged by the filing of the second bond under the circumstances of this case.

The proceedings of Bradley to procure his discharge were

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attempted to be had under the Act concerning sureties on official bonds, approved April 18th, 1853, which provides as follows, to wit:

"SEC. 2. Any surety on the official bond of a city, county or State officer may be relieved from liabilities thereon afterwards accruing by complying with the following provisions of this Act:

"SEC. 3. Such surety shall file with the Court, Judge, Board, officer, person or persons, authorized by law to approve such official bond, a statement in writing, setting forth the desire of the said surety to be relieved from all liabilities thereon afterwards arising, and the reasons therefor, which statement shall be subscribed and verified by the affidavit of the party filing the same.

"SEC. 4. A copy of the statement shall be served on the officer named in such official bond, and due return or affidavit of service made thereof, as in other cases.

"SEC. 5. In ten days after the service of such notice, the Court, Judge, Board, officer, person or persons, with whom the same may be filed, shall make an order declaring such office vacant, and releasing such surety from all liability thereafter to arise on such official bond, and such office shall thereafter be held in law as vacant, and be immediately filled by election or appointment, as provided for by law, as in other cases of vacancy of such office, unless such officer shall have, before that time, given good and ample surety for the discharge of all his official duties, as required originally.

"SEC. 6. This Act shall not be so construed as to release any surety from damages, or liabilities for acts, omissions or causes existing, or which arose before the making of such order as aforesaid, but such legal proceedings may be had therefor in all respects as though no order had been made under the provisions of this Act." (Laws 1853, p. 224.)

Discharge of surety on official bond.

By the provisions of sections three and five the statement must be filed with, and the order declaring the office vacant

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and the sureties discharged must be made by the "Court, Judge, Board, officer, person or persons authorized by law to approve such official bond." That is to say, the proceeding to obtain a valid discharge must be had before the officer or tribunal *authorized by law to approve the official bond* of such officer, and not by the tribunal or officer which *did, in fact, approve the bond*. It was so held — and we think correctly — in *People v. Scannell*. Scannell having been elected and qualified entered upon the duties of Sheriff of the County of San Francisco. Afterward Charles Cook, one of the sureties upon the official bond of Scannell, under the provisions of the Act now under consideration, presented his petition to the County Judge of said county praying to be relieved of all future liability on his bond. The County Judge made an order declaring the office vacant by reason of the failure of defendant to file a new bond as required by the order of the Judge. The bond on which Cook was surety, had been approved by the County Judge according to the law then in force. Subsequently, and before the application of Cook to be discharged, the Consolidation Act took effect, which required all bonds of county and city officers to be approved by the County Judge, Auditor and President of the Board of Supervisors. One of the questions in the case was, whether the proceeding before the County Judge to discharge the sureties of Scannell and declare the office vacant was valid. The Court say: "The defendant insists that the County Judge had no jurisdiction, and, therefore, the proceedings before him, upon the petition of Cook, were void, the Consolidation Act having taken from the County Judge the power to approve official bonds, and vested it in a Board of officers, of which he was only one of the members.

"This position would seem to be correct. The phrase, 'persons authorized by law to approve such official bond,' does not refer to the person who did in fact approve the particular bond, but it refers to the Board or person then authorized to approve 'such official bond'—that is, a Board of that character. If it had been the intention of the Act to confine

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the jurisdiction of such cases to the same officer who approved the particular bond, then it would not have used language in the present tense, 'persons authorized to approve,' but would have said, 'persons who approved such bond.' The different provisions of the statute, when taken together, clearly sustain this view. The surety must proceed before the person or Board who would be authorized to approve the 'new bond,' in case the officer should execute one. The new bond, in this case, could only be approved by the County Judge, Auditor and President of the Board of Supervisors. The bonds of all officers of the City and County of San Francisco could only be approved by them; and Scannell was, after the taking effect of the Consolidation Act, by its own terms, strictly an officer of the city and county. As such, any official bond executed by him must be approved by the Board of Examiners, if I may properly so call them. The new sureties given by him in such case must possess the qualifications required by the fourteenth section. The bond to be given by him, upon the petition of Cook, was a new bond, to operate in future, and must come under the provisions of the Consolidation Act as to its approval and the qualifications of the sureties. If these views be correct, then the proceedings before the County Judge were void for want of jurisdiction, and the order made by him did not discharge Cook and did not affect the rights of the defendant in any manner whatever." (7 Cal. 436.)

County Judge cannot discharge sureties on official bond of Treasurer.

The proceeding in the case now under consideration was before the County Judge. The petition was addressed to and marked filed by him, and all the subsequent proceedings had in the matter were had before that officer. The bond in suit had been approved by the County Judge. Evidently the parties supposed the County Judge to be the officer before whom the proceedings must be had to procure a discharge of the sureties, and they acted accordingly. It becomes necessary to determine, then, whether the County Judge is the officer or person "authorized by law to approve such official bond;"

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in other words, whether he had jurisdiction to act in the matter. Section one of the "Act concerning the official bonds of officers," passed February 28th, 1850, provides that "the official bonds of Sheriffs, Coroners, Justices of the Peace and all other county officers shall be approved by the County Judge." (Laws 1850, p. 74.) But subsequently, on the 27th of March, 1850, "An Act concerning the office of County Treasurer" was passed, in which it was provided that "each County Treasurer * * * shall enter into a bond, with two or more sufficient freehold sureties, to the acceptance of the Court of Sessions of his proper county," etc. (Laws 1850, p. 115, Sec. 2.) And by the twenty-fifth section of the Act of March 20th, 1855, to create a Board of Supervisors, etc., the powers and duties of this nature were transferred from the Court of Sessions to the Board of Supervisors. In referring to these Acts, the Court say, in *People v. Breyfogle*, 17 Cal. 509: "This Act of the 27th of March, 1850, is subsequent to the general Act imposing the duty of approving bonds of county officers upon the County Judge, and, as the Act is special, must be considered as superseding the more general provisions of the first in this regard." This case is not in conflict with *People v. Supervisors of Marin County*, 10 Cal. 345, or *People v. Buster*, 11 Cal. 218, as appellants' counsel seems to suppose. The observation in the first case had reference to a Constable's bond, which is properly approved by the County Judge. (Laws 1850, p. 263, Sec. 1, and *Ib.* p. 74, Sec. 1.) In *People v. Buster* the question was not made, and the attention of the Court and counsel does not appear to have been drawn to the provisions of the Act of March 27th, 1850, or the subsequent Act of 1855. It was assumed that some of the sureties were legally discharged, and the question was whether the discharge of a portion of the sureties on an official bond discharged them all. The Board of Supervisors, then, is the body authorized by law to approve of the official bonds of County Treasurers.

It follows that the County Judge had no jurisdiction in the proceeding to discharge the sureties, or to approve the new bond, and that his acts in the matter are void. The whole

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proceeding having been taken before an officer having no jurisdiction under the statute, it was ineffectual to discharge the sureties or either of them from further liability on the bond. Nor does the fact that the bond sued on was also approved by the County Judge affect the question. The liability of the sureties on the bond does not depend upon the approval of the County Judge. Section eleven of the "Act concerning the official bonds of officers" provides that, "whenever * * * there shall be any defects in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties," etc. Under this provision the sureties were clearly liable upon the bond notwithstanding the defective approval, and the question is, not whether the sureties on the new bond are also liable, but whether the sureties have become discharged from their liability on the original bond, by virtue of the proceedings under the statute? We think it clear that they were not, for the provisions of the statute were not pursued.

For the purpose of the decision we have assumed the papers showing the state of facts relied on to discharge the sureties to be in evidence. They were offered as a whole, and with their indorsements show precisely what was done, viz: the state of facts assumed. But this state of facts is wholly ineffectual to discharge the appellants from their liability as sureties on the bond. They do not establish, or tend to establish a defense to the action, and there was no error in excluding the documents.

The other points made as to the suit being dismissed as against some of the defendants, and as to proceeding to trial and judgment upon the issues joined by appellants, without waiting for service upon other defendants, are answered by Sections 15, 32, 146 and 148 of the Practice Act. (See also *People v. Love*, 25 Cal. 526-31; *Reed v. Calderwood*, 22 Cal. 465.)

The judgment must be affirmed, and it is so ordered.

Mr. Justice RHODES was absent at the argument of this case, on account of sickness in his family, and consequently did not participate in the decision.

LEONIDAS HASKELL v. GEORGE H. MOORE AND FRANCIS B. FOLGER.

COMPLAINT.—If a complaint contains more than one count, and one of the counts does not state a cause of action, the answer need not deny the allegations of such count, and objections may be made to it for the first time in the Supreme Court.

CONSTRUCTION OF COVENANT TO INDEMNIFY.—Where plaintiff and defendants had been engaged in purchasing and exporting merchandise on their joint account up to a certain time, and the defendants then withdrew from the business, and plaintiff carried it on on his own account for a time, and then the parties entered into an agreement to carry on the business together, and defendants covenanted to indemnify plaintiff against all liabilities connected with the business in which the parties had before been engaged; *held*, that the covenant did not apply to the liabilities incurred by plaintiff while he carried on the business on his own account.

PARTNERSHIP ACCOUNTS.—In an action at law to recover damages for failure to comply with a covenant to indemnify plaintiff against liabilities, the defendant cannot set up, as a counter claim, demands which were matters of partnership between the parties.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The plaintiff appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellant.

"If parties enter into a contract for partnership, and the evidence shows that they afterward do business in accordance with the terms of such contract, they are partners in that business," and to support this position see *Owen v. Van Uster*, 1 Eng. Law and Eq. R. 396; *Taylor v. Taylor*, 2 Murph. 70; *Williams v. Jones*, 5 B. & C. 110; *Aspinwall v. Williams*, 1 Ham. 84; *Austin v. Williams*, 2 Ham. 64; *Crary v. Williams*, 2 Ham. 65; *Dix v. Otis*, 5 Pick. 39; *Walden v. Sherburne*, 15 Johns. 409; *Goddard v. Pratt*, 16 Pick. 412; *Wright v. Hooker*, 10 N. Y. 6 Seld. 51; *Murray v. Johnson*, 1 Head. 353; *Avery v. Lauve*, 1 La. An. 457.

John Reynolds, for Respondent.

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By the Court, CURREY, C. J.

This case has once been passed upon and the judgment affirmed by this Court, but upon a petition for a rehearing the judgment of affirmance was set aside. Since then the case has been elaborately reargued by counsel on behalf of the plaintiff. All the questions involved in the case have, we believe, received that careful attention and consideration by the Court which a case of its merits justly demands. We say this, because counsel have more than intimated that in this respect we were derelict of duty in our former examination and disposition of the case. Regarding the first count in the complaint as stating a cause of action against the defendants—Moore & Folger—we examined and passed upon the case as we supposed upon its merits, and are satisfied that we came to the only conclusion, so far as the plaintiff's right to recover is in question, that could be arrived at in conformity to the law and evidence.

Answer when complaint contains no cause of action.

The plaintiff claims that he is entitled to a reversal of the judgment of the District Court, and a final judgment in his favor in this Court on the ground that the answer does not deny the allegations of the first count of the complaint—"always provided," say his counsel, "that we have set out a good cause of action in the complaint." It is not insisted that the answer does not traverse the allegations of the second count of the complaint, which is in form of a common count for money by the plaintiff paid, laid out and expended to and for the use of the defendants, and at their instance and request. We are of opinion that every allegation of the complaint intended to be controverted is sufficiently denied. But whether the first count of the complaint is well controverted or not is immaterial, for we are of the opinion it does not set forth any cause of action against the defendants. It seems to have been objected to on this ground in the Court below, by demurrer, which was overruled. This we infer from what the

plaintiff's counsel say in argument, but whether it was or not the objection is made in this Court on the part of the defendant, and we are not at liberty to disregard its consideration.

Construction of covenant to indemnify.

This action was brought against Moore & Folger, partners in business, after which Folger died, and the action since then has proceeded against Moore as the sole defendant. By the complaint it appears that from some time in the year 1855, up to the 3d of November, 1857, the plaintiff and defendants were engaged in business in San Francisco, in purchasing in California and elsewhere on the Pacific coast, merchandise, principally hides and wool, and exporting the same from the Port of San Francisco to other ports for sale. That they carried on said business for their joint account and profit, and at their joint risk, until the 3d of November, 1857, at which time the defendants were compelled, by pecuniary embarrassments, to suspend their business, and the said joint business was discontinued, and from that day until the 28th of October, 1858, the plaintiff "continued the said business and carried it on on his own account and in his own name, and in the same manner it had before been carried on on the joint account of plaintiff and defendants, in the name of defendants, and with the same implements, agents and machinery." The plaintiff then alleges that at the last mentioned date he had shipped to New York and elsewhere, principally by vessels put up by the defendants as general freighters, a large amount of merchandise, principally hides and wool, on consignments for sale, from which he had not received any return, or only partial returns or accounts of sale; some of which merchandise was then upon the defendants' ships on the high seas, and some on the defendants' ship Peruvian, lying in the Port of San Francisco, destined for the Port of New York; and the plaintiff then alleges that on that day he "was bound and liable for liabilities connected with and growing out of said exporting and importing business up to the sailing of the said ship Peruvian, in the sum of seventy-three thousand nine hundred and

ninety-nine dollars, bearing interest at different rates, from two to three per cent per month," and that on that day the plaintiff and defendants entered into an agreement in writing, under their hands and seals, which is set forth in the complaint, by which they agreed with each other "to carry on the hide and wool business and other merchandising, exporting and shipping business together, at the City of San Francisco, for the term and period of five years from date." The third article of this agreement is in the words and figures following: "The said Haskell is to be fully indemnified by the said Moore & Folger against all liabilities of every kind connected with the exporting and importing business in which the parties hereunto may have been engaged prior to November 1st, 1857, and up to the date of the sailing of the ship Peruvian from the Port of San Francisco, where she is now being loaded, and all the profits of said exporting to belong to said Moore & Folger up to the same date." The plaintiff avers in general terms that he has performed and fulfilled all the covenants, promises and agreements contained in the agreement on his part to be kept, performed and fulfilled. Following this, it is alleged in the complaint: "Yet the said defendants, not regarding their said contract and undertaking, have failed to keep and have broken the same, in that they, the said defendants, have not indemnified the said plaintiff against all or any of the liabilities connected with the exporting and importing business referred to in the third article of the said contract, and which had lawfully accrued against said plaintiff, or for which he had fully become liable in said business prior to the sailing of the ship Peruvian from the Port of San Francisco next ensuing the date of said contract; that the said plaintiff remained and was liable and bound to pay, all and singular, the said indebtedness of seventy-three thousand nine hundred and ninety-nine dollars, with interest as aforesaid, and still is bound to pay the same, except so much thereof as he has paid out of his own funds and estate, to his great damage, to wit: to his damage one hundred thousand dollars; therefore he brings suit."

The liabilities mentioned in the complaint as connected with

and growing out of the exporting and importing business for which the plaintiff was bound and liable, were debts bearing interest which had lawfully accrued against him, or for which he had fully become liable in said business prior to the sailing of the ship *Peruvian*. Here two questions are presented for consideration: First — Was the aggregate liability or “indebtedness” of seventy-three thousand nine hundred and ninety-nine dollars the joint liability or indebtedness of the plaintiff and defendants, or the individual liability or indebtedness of the plaintiff? Second — If the same was the individual liability or indebtedness of the plaintiff, then were the defendants bound by their covenant to indemnify the plaintiff against the same?

We shall consider these questions together. The plaintiff alleges in his complaint that the business in which the parties were jointly engaged prior to the 3d of November, 1857, was discontinued on that day, and that from that time until the 28th of October, 1858, the date of the contract, the plaintiff continued the business, and carried it on on his own account and in his own name; and he also alleges that the liabilities mentioned and on which he founds the breach of the contract on the part of defendants, and accrued, not against the plaintiff and defendants jointly, but against the plaintiff in said business. We have here the plaintiff's construction as to the kind of liabilities to which the defendants' covenant applied. He, in effect, claims that the covenant was to indemnify him against liabilities connected with the exporting and importing business, which had accrued against him individually while he was carrying on the business on his own account in his own name. By reference to the covenant, the liabilities therein mentioned are limited to those connected with the exporting and importing business in which the parties — the plaintiff and Moore & Folger — had been engaged. After having considered and weighed all that has been said on the subject on behalf of plaintiff, our judgment is that the defendants' covenant had reference only to the joint liabilities of the parties, or, in other

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form by the contract referred to. He found that the business which the parties, by that contract, designed carrying on was never commenced. This finding is fairly supported by the testimony of Bunker and Folger. In the plaintiff's letter to his friend Mason, bearing date December 11th, 1858, he speaks of having had a final settlement with Moore & Folger, and says: "They have attempted to do as they agreed with me, but have again been unable to come up with their agreement with me; consequently, I am doing the business myself." This letter, from its subject matter, seems to have referred to the transactions had between the parties on the 28th of October previous, and at the date of the letter the plaintiff, according to his own account, was doing the "business" himself. Bunker's testimony shows that the aggregate principal sum for which the judgment now stands accrued between the 1st of January, 1859, and the 9th of February, 1860, and that during that time, though in the employment of Moore & Folger as their bookkeeper, he did not know of any business between them and plaintiff, except that plaintiff shipped goods upon their vessels, as other shippers did. This is consistent with the plaintiff's statement contained in his letter. We are of the opinion the judgment is sustained by the evidence and should be affirmed.

Judgment affirmed.

Mr. Justice SAWYER and Mr. Justice SHAFTEE, being disqualified, did not participate in the decision.

**LEVI B. MASTICK *et als.* CONSTITUTING THE BOARD OF
EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO
v. WILLIAM H. THORP.**

PURCHASE OF PROPERTY PENDING AN ACTION TO RECOVER POSSESSION OF IT.—One who buys land during the pendency of an action to recover possession of it, in which his grantor is a defendant, may thereafter continue the defense in the name of his grantor, or may cause himself to be substituted in his place.

GRANTING A NEW TRIAL IN AN ACTION AT LAW BY A COURT OF EQUITY.—A Court of equity will not grant a new trial in an action at law where the

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applicant knew of the rendition of the judgment against him in the law action in time to have moved for a new trial in the law Court.

WHEN COURT OF EQUITY WILL ORDER A NEW TRIAL IN A LAW ACTION.—A party cannot maintain an action in a Court of equity to set aside a judgment against him rendered in a Court of law and obtain a new trial without showing that he had no opportunity to move for a new trial in the law Court, by reason of some mistake, accident, or surprise, unaccompanied by any fault or negligence on his part.

SAME.—Courts of equity will not interfere and set aside a judgment at law, except when it has been obtained by fraud, or through some accident or mistake, without *laches* on the part of the party complaining, and after all remedy at law has been lost.

SAME.—One who buys land during the pendency of an action against his grantor to recover possession of it, with a notice of the suit, and neglects to defend it until judgment is obtained against his grantor, and then neglects to move for a new trial, cannot obtain a new trial in a Court of equity.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The defendant appealed from an order denying his motion to dissolve a preliminary injunction which had been granted at the commencement of the action.

The other facts are stated in the opinion of the Court.

Pixley & Smith, and *A. B. Bates*, for Appellant, cited *Peabody v. Phelps*, 7 Cal. 53; *Borland v. Thornton*, 12 Cal. 440; *Lansing v. Eddy*, 1 John. Ch. R. 49; and *Dodge v. Strong*, 2 John. Ch. R. 230.

John H. Saunders, for Respondent.

By the Court, SANDERSON, J.

This is an appeal from an order denying a motion to dissolve an injunction. The motion was made on the complaint and answer unaccompanied by any affidavits upon either side.

The action was brought to restrain the defendant by injunction from enforcing, by execution or otherwise, a certain judgment which he had obtained in an action of ejectment against the plaintiff's grantors, and to open and set the same aside, or in other words to obtain a new trial in that action.

The facts, as detailed in the complaint, are substantially as follows:

An action was brought by the defendant in this case to recover the possession of the premises in question against one Donnelly, who was in possession as tenant of one Cheney, who intervened and employed counsel to defend the action. Thereafter, and pending the action, Cheney sold and conveyed to the present plaintiffs, who thereupon became entitled, under the sixteenth section of the Practice Act, to continue the defense of the action in the name of Cheney or to cause themselves to be substituted in his place. At the time of their purchase, which was the 4th of December, 1863, the plaintiffs had full notice of the pendency of the action, but they took no steps in regard to its further defense, and there was no covenant on the part of Cheney to further defend the title. They neither retained the counsel who had appeared for Cheney, nor did they inform the City Attorney of the pendency of the action, nor did they employ other counsel. In short, they took no steps whatever to defend the action, but rested entirely upon the supposition or belief, as they allege, that the attorneys who represented Cheney would continue, after the purchase, to represent them, notwithstanding, as they admit, no request to that effect was made by them and no fee paid or offered. Some seven months after the purchase, the same being regularly on the calendar, the action was brought to trial by the plaintiff, (defendant in the present case,) but no one appeared on the part of the defense, and the trial was altogether *ex parte* and resulted in favor of the plaintiff. The present plaintiffs had no actual notice or knowledge of the trial before or at the time it took place. When they learned that a trial had been had, whether in time or too late to move for a new trial, does not appear, and no reason is given why a motion for a new trial was not made.

In view of the foregoing facts, in connection with a general allegation to the effect that their title is good, while that of the defendant is worthless and pretended, the plaintiffs claim the interposition of a Court of equity, and allege that they are entitled to the relief sought by them on the ground of surprise.

Complaint in equity to obtain a new trial.

That the complaint contains no cause of action hardly admits of debate. That it does not is manifest from the single fact, independent of the matters set out, that the complaint assigns no reason why the plaintiffs did not avail themselves of the remedy afforded by a motion for a new trial. If they were informed of the trial and judgment in time to move for a new trial, that remedy would have been all-sufficient, and that they were not informed in time is not alleged. We are compelled, therefore, to assume that they did learn it in time. Such being the case, they were bound to exhaust their legal remedies by moving for a new trial in the Court of law before coming to a Court of equity to obtain it. By this action the plaintiffs can obtain no relief which they could not have obtained by a motion for a new trial in the original action; for if their neglect to defend that action by motion, and no full relief was attainable in that action by motion, and no resort to this action was necessary. For this reason alone they cannot be allowed to maintain this action without showing that they had no opportunity to make the motion, by reason of some mistake, accident or surprise, unaccompanied by any fault or negligence on their part.

When Courts of equity will not set aside a judgment at law.

But, independent of the foregoing consideration, the complaint is, in our judgment, entirely destitute of equity. Courts of equity will not interfere and set aside a verdict or judgment at law, on the theory of this case, except where it has been obtained by fraud or through some accident or mistake, without fault or *laches* on the part of the party complaining, and after all remedy at law has been lost. (2 Story's Eq. Juris., Sec. 887, *et sequens*.) But all these grounds of equity jurisdiction are wanting in the present case. It is not pretended that the judgment in question was obtained by fraud on the part of the defendant in this action or any one else. That the plaintiffs in this action were not prevented from making their

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defense by inevitable accident or mistake or excusable neglect, is obvious upon a mere recitation of the facts. That their failure to defend was the result of gross inattention and negligence on their part, and not a mistake, inadvertence or surprise, or excusable neglect, against which a Court of equity will grant relief, finds, we think, a conclusive demonstration in the dry statement of the facts which we have already given, unaccompanied by argument. The relief sought for is asked upon the sole ground that they *supposed* or *believed*, under the circumstances detailed, that the attorneys of Cheney would continue their charge and management of the case. If such was their belief it was without any foundation in reason, and opposed to every intrinsic probability. The attorneys of Cheney would have been obnoxious to the charge of impertinence had they continued in the case after their client had ceased to have any interest in the result, and assumed, unretained and unasked, to manage the case for his grantees, who not only did not seek a continuance of their services, but ordinarily would not, in view of the fact that they were public functionaries, and had counsel appointed by the law, whose duty it was upon their suggestion to attend to the matter in question.

With full and complete knowledge of all the facts and circumstances, the plaintiffs failed to make any provision for the defense of the estate which they had acquired, and rested upon the vague notion that because the lawsuit, which they had purchased with their eyes open, had been on the calendar of the Court for a long time without a trial, it probably never would be tried, and upon the unfounded belief that if by chance the case should ever be brought to trial their interests would be defended by counsel whom they had never retained, and who, therefore, would have had no legal claim against them for compensation for their services. It is impossible to conceive a case more barren of all claim to the interposition of a Court of equity. The whole case made by the plaintiffs may be summed up in the forcible language of counsel for appellant: "They purchased a lawsuit and neglected to defend it." Instead of showing that they have been the vic-

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tims of some fraud, accident, mistake or surprise against which ordinary prudence could not have furnished a safeguard, they show a want of prudence and care which would be inexcusable in a business man of the most limited capacity. Instead of showing that they belong to that vigilant class to whose complaints a Court of equity always lends a willing ear, they have shown that they belong to that idle class of whom a Court of equity will take no care, because, with ample opportunity and means, they fail to take care of themselves. To the complaints of this latter class a Court of equity will not listen. (*The Board of Commissioners of the Funded Debt of the City of San José v. Younger, ante*, 172.)

The order refusing to dissolve the injunction is reversed, and the cause is remanded with instructions to the Court below to dissolve the injunction.

THE PEOPLE v. B. F. HASTINGS.

AN ASSESSMENT NECESSARY TO THE VALIDITY OF A TAX.—A tax, in order to be valid, must rest upon an assessment made in the mode prescribed by law, by an Assessor elected by the qualified electors of the district, county, or town in which the property is taxed for State, county, or town purposes.

WITHOUT AN ASSESSMENT A TAX DEED VOID.—If the property is not listed and assessed for the purpose of taxation, the tax deed conveys no title.

ASSESSOR TO BE ELECTED BY THE DISTRICT WHERE THE TAX IS LEVIED.—An assessment made by an Assessor elected by the qualified electors of the City and County of Sacramento, is not a sufficient basis for the levy of a tax in the City of Sacramento for city purposes.

COPYING A FORMER ASSESSMENT ROLL NOT AN ASSESSMENT.—The making of a certified copy by an Assessor of an assessment roll made by another Assessor a previous year, is not an assessment of property.

LAW FIXING THE ASSESSED VALUE OF PROPERTY.—The Legislature cannot, by law, fix the assessed value of property.

AN ANSWER NEED NOT DENY AN AVERMENT OF LAW.—Proceedings which are void by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had, and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal.

APPEAL from the District Court, Sixth Judicial District,
Sacramento County.

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The defendant recovered judgment and the plaintiff appealed. The other facts are stated in the opinion of the Court.

M. M. Estee, for Appellant.

Moore & Alexander, and *R. Robinson*, for Respondent.

By the Court, RHODES, J.

Suit was brought for the recovery of delinquent taxes levied for the year 1863. The defendant had judgment and the plaintiffs appeal from the judgment and the order refusing a new trial. It appears from the pleadings that the taxes sued for were levied under the Act to incorporate the City of Sacramento, approved April 25th, 1863. (Stats. 1863, p. 415.) The assessment was made under the provisions of the following sections of that Act:

"SECTION 63. For the purpose of enabling the city authorities to levy and collect the annual and special taxes for the fiscal year commencing on the first Monday in April, A. D. 1863, in the months of April and May of said year, the Board of Trustees are hereby authorized and empowered to levy the annual and special taxes provided in this Act within three days after the first meeting in 1863, upon all the taxable property within the limits of the City of Sacramento as assessed in the equalized assessment roll of the City and County of Sacramento for the year 1862. And said taxes when so levied shall be a lien upon all property in said assessment roll for said fiscal year.

"SEC. 64. It is hereby made the duty of the Assessor to make a certified copy of the assessment roll for said year 1862, so far as to include the property of the city, which assessment is hereby adopted, and the value of the property in the same is made the basis for said taxes, and deliver the same to the Auditor."

The property assessed was personal property, and its value stated at forty-five thousand dollars.

It will be unnecessary to examine the errors assigned by the appellant, for one ground of objection taken by the respondent is fatal to the action, and that is, that there was no assessment of property in the City of Sacramento for the purposes of taxation for the year 1863. It is alleged in the complaint that the Board of Trustees did levy the taxes in 1863 upon "all the taxable property within the limits of said city, as assessed in the equalized assessment roll of the City and County of Sacramento for the year 1862;" and section sixty-three, already cited, was the only provision of the Act authorizing the levy to be made for the year 1863. It is further alleged in the complaint that the City Assessor made a certified copy of the assessment roll for the year 1862, which served as the assessment list for 1863. It thus appears that no assessment was made for the year 1863, unless the copy just mentioned constituted an assessment.

Property must be assessed or tax is not valid.

Section thirteen of Article XI of the Constitution of the State is as follows: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors of town, county and State taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated."

The requirement that the value of the property to be taxed shall be ascertained as directed by law, means that the property shall be assessed for the purpose of taxation, and that the taxes may be levied only after the property has been so assessed. An assessment, made as directed by law, is an indispensable basis for the support of the tax that may be levied upon it. The constitutional requirements are not satisfied merely by an assessment made in the manner directed by law, but it is also provided that the Assessors of town, county or State taxes shall be elected by the qualified electors of the district, county or town in which the property to be taxed is

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situated—that is to say, that the assessment must be made by a person elected as an Assessor by the qualified electors of such district, county or town. A tax, in order to be valid, must rest upon an assessment made in the mode prescribed by law and by an Assessor elected as provided for by the Constitution. This proposition requires no argument for its support, for it arises from the plain and unmistakable import of the terms employed in the section cited. In *Ferris v. Coover*, 10 Cal. 632, Mr. Justice Field says: “In the present case the recitals show that the property was not listed and valued by the Assessor. This is fatal to the deed. The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings.”

By recurring to the Act of 1858 to incorporate the City and County of Sacramento, it will be seen that the Assessor who made the assessment for the year 1862 was elected by the qualified electors of the City and County of Sacramento, which is a different district from that of the City of Sacramento. The insufficiency of that assessment as the basis of taxation for the year 1863 is apparent on several grounds. It was not made by an Assessor elected by the qualified electors of the district in which the property to be taxed was situated—the City and County of Sacramento not being the same district as that of the City of Sacramento. The making of the certified copy of the assessment roll for the year 1862 so as to include property within the City of Sacramento, cannot be regarded, in any sense, as the making of an assessment of such property by the Assessor. The copying by one officer of the valuation made by another officer is not a valuation made by the first officer. If it is a valuation in any sense for the year 1863, it is a valuation made by the Legislature; and in view of the division of the powers of the Government into three departments—the legislative, executive and judicial—according to Article III, it will not be claimed that the legislative department was competent to perform the purely executive functions of an Assessor.

The objection is not obviated by the finding that the assess-

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ment was "duly and regularly made" in accordance with the statutes, for the only assessment that was provided for by the statutes, was the attempted adoption of a previous assessment, and if any other than such an assessment had been made, the valuation would not have been "ascertained as directed by law." Nor is the objection met by the fact that the defendant failed to deny that the assessment of the property was duly and legally made — that is to say, that it was made in accordance with the statute — for the objection which goes to the statute itself, the invalidity of which the defendant was not required to present in his answer, still subsists. Proceedings which have no validity, in consequence of an inherent infirmity in the statute under which they were had, are not cured by the allegation that they were duly and legally had. They cannot be forced by averment higher than the source from which they spring. The objection still remains, notwithstanding the finding of the Court, and the alleged admission of the defendant, that he was in 1863 the owner of the property, and that it was then of the value specified in the Assessor's copy from the assessment roll of the previous year; for it is not enough that the defendant was the owner of the property attempted to be charged with a tax, and that it was of the value alleged; but a valuation of the property, by an Assessor of the proper district, town or county, is an indispensable prerequisite to the validity of the tax, with which the property is attempted to be charged.

Judgment affirmed.

DANIEL FINCH v. THE BOARD OF SUPERVISORS OF TEHAMA COUNTY.

BOARD OF SUPERVISORS—JURISDICTION.—A Board of Supervisors is a body with limited jurisdiction, and its jurisdiction must appear in the record of its proceedings.

SAME—FERRY LICENSES.—A Board of Supervisors has jurisdiction over the subject matter of granting and renewing ferry licenses.

RENEWAL OF FERRY LICENSE.—One who applies for a renewal of a ferry license, claiming precedence as an absolute right under the statute as

Argument for Petitioner.

against a party making an original application, must show that he has kept the ferry the preceding year in accordance with law.

OBJECTIONS TO RENEWAL OF FERRY LICENSE.—If one who has a ferry license gives notice of an application for a renewal of the same for another year, any person may appear on the day appointed in the notice for a hearing, without any notice or citation to the applicant, and file objections to the renewal, and the Board may hear testimony on both sides.

REFUSAL TO RENEW FERRY LICENSE.—If a contest arises on the renewal of a ferry license, the Board of Supervisors has jurisdiction, upon the testimony, if found to be insufficient to entitle the party to a renewal, to reject the application.

GRANTING FERRY LICENSE.—If an application for a renewal of a ferry license is rejected, the Board has jurisdiction to grant an original license to one who has filed his petition and given proper notice of his application.

Query 1.—Has one whose application for a renewal of a ferry license has been rejected, and who did not appear and contest the granting of a license to another party making an original application, a right to be heard on a writ of review as to the action of the Board of Supervisors in granting a license to said original applicant?

The facts are stated in the opinion of the Court.

P. L. Edwards, for Petitioner

The relator, like any other person invested with a public trust, is presumed to have done his duty, and if he failed, the statute points out the only proceeding by which his license could be revoked, to wit: by complaint, duly verified, and summons issued thereon and served. (1 Hittel's Dig. par. 3,086; *Chard v. Stone*, 7 Cal. 117.)

The jurisdiction of inferior tribunals must be affirmatively shown. The *facts* constituting it are not to be presumed. (2 Cow. & Hill's Notes to Phil. on Ev. 179, N. 97, and p. 182.) These views are fully sustained in 7 Sm. & Mar. 85; 11 Mass. 510; 1 Bibb. 496; 4 Mass. 641; 3 Barb. 341; 19 John. 38; 9 Cow. 227. The general question is ably reviewed in *Crepps v. Durden et als.*, 1 Smith's Leading Cases, marginal p. 378, and notes.

No facts showing are divestiture of the relator's rights were found by the Board or are in anywise indicated by the return; but such a state of facts is necessary to evidence the jurisdiction of the Board and the regularity of its proceedings.

H. H. Hartley, for Defendant.

In proceedings on certiorari, such as the one under consideration, it is clearly established by the books that the question does not arise whether the Board of Supervisors decided properly or improperly upon the evidence introduced before them; nor can questions of fact be considered except so far as the same may be necessary to show whether the inferior tribunal had jurisdiction of the case; but the sole subject for examination is whether the tribunal had jurisdiction and did not exceed it. If the introduction of a certain state of facts is necessary to show that the inferior tribunal had jurisdiction, then this Court will examine the evidence to that extent, and no further; and should it appear after such examination, from the law and evidence, that such tribunal had jurisdiction of the case and parties, and acted within that jurisdiction, then there is a period to the inquiry and an end to any further proceedings. (*People ex rel. Whitney v. Board of Delegates of San Francisco Fire Department*, 14 Cal. 479; *People v. Mayor of New York*, 2 Hill, 9.)

By the Court, SAWYER, J.

We are asked upon certiorari to review the action of the Board of Supervisors of Tehama County in denying a renewal of a ferry license to Finch, and in granting a license to one Harvey. The only question of which we can take cognizance is, whether the Board in the action taken exceeded its jurisdiction. The proceedings in the two applications of Finch and Harvey were separate (Finch's application having been first made and disposed of,) and they must be separately considered in their proper order. That the Board of Supervisors is a body with limited jurisdiction, and that its jurisdiction must appear in the record of its proceedings is not doubted. Jurisdiction over the subject matter is expressly conferred upon the Board of Supervisors by the second section of the Act of 1855. (Laws 1855, p. 183.) Finch gave the statu-

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tory notice and filed his petition, in which he stated the granting of a license to him for the preceding year; that he had "exercised said right by operating said ferry till the [then] present time," and that he was "desirous of continuing to operate said ferry," and thereupon asked a renewal of the license. On the first day of May, the day for which the application was noticed, Harvey, who had also given notice of an application for a license to run a ferry at the same point, appeared before the Board to contest the application of Finch, and filed a remonstrance, alleging, among other things, as objections to the renewal of the license, that Finch had abandoned the ferry in the preceding August, and that he had not kept said ferry according to law.

The applicant, Finch, introduced testimony and rested. The contestant, Harvey, then introduced the testimony of several witnesses, and the applicant examined several others in rebuttal. After the testimony was closed the Board adjourned, holding the matter under advisement till the next day, when the application was denied. The applicant moved to strike out the objections of the contestant, Harvey, and opposed the introduction of all the testimony offered by him substantially on the ground that no citation had been issued to, or served on the applicant, and he had no notice; and, also, that the Board had no jurisdiction of that portion of the proceeding taken under the objections of the contestant.

Contest concerning a ferry license.

The applicant, and not the contestant, was the *actor* in this case. He was applying for a new license, to commence on the expiration of the term for which a license had already been granted — not defending against a proceeding to revoke a license instituted under the provisions of section twenty-four. If he had kept the ferry "in accordance with law," and "in all respects complied with the terms and requisitions of this 'Act,'" section seven gave him a preference in an application for a further license "over any party making original application." But his application for a renewal was a new pro-

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ceeding, and it developed upon him to show affirmatively all the facts necessary to entitle him to preference. On a proceeding against him to revoke the existing license, undoubtedly, the party seeking the revocation would be called upon to show that he had not kept his ferry as required by law, because he would be the attacking party. The presumptions would then be that the party resisting the proceeding had performed his duty till the contrary should be shown. But no such presumption exists in favor of a party who is seeking a further privilege on the ground that he has faithfully discharged his duty in respect to a privilege before granted. The party seeking the right must affirmatively show all the facts which are necessary to entitle him to the thing sought. In this case the petition of Finch does not even distinctly allege that he had kept his ferry "in accordance with law," but no point was made on this defect. He was the actor, however, and not the defendant. The law required him to give notice of his intended application. It is true no particular mode is pointed out by which objections shall be made, nor is it said who may object. But for what end is the notice required, unless it be that objections may be made by anybody who may be interested in defeating the application? If a ferry is necessary for the convenience of the public, the public convenience and the convenience of every man who has occasion to use it require that it shall be kept in all respects in a manner to render it most subservient to such public convenience, and every man in the community is interested in having the franchise conferred upon a proper person. It is for this reason that a notice is required to be given of an intended application for a ferry license, that any one interested may have an opportunity to present any valid objection to the application, or to the applicant. The notice is to everybody, and calls upon any one who has a substantial objection to appear and make it known. The contestant, then, was one of the parties to be notified of the intended application; and, in response to the notice, he appeared on the appointed day,

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and put his objection in a specific form in writing upon the records of the Board. And the objections, if well grounded, were such as would and should defeat the application. We think that the Board of Supervisors not only had jurisdiction to consider the objections and the evidence introduced upon the issues raised by them, but that it was its duty to do so.

It is true that in the final order, made after taking the matter under advisement, the Board do not specify the facts found from the testimony, but they rejected the application after a full and patient investigation of the issues presented. There was no arbitrary action. There was a petition and objections presenting material issues filed. Evidence was taken and the parties were heard in person and by counsel, and, after due deliberation, the Board were of the opinion that the applicant was not entitled to a renewal of the license, and it was therefore denied. This was a question which it had jurisdiction to determine. But, if we look into the record of the case, there is nothing, conceding the petition to be sufficient, after an issue was raised upon the petition by the objections filed, to show to this Court that the petitioner made out even a *prima facie* case, and the *onus* of proof, as we have seen, was on him. We think there was no excess of jurisdiction in denying the application of Finch.

The application of Finch having been rejected, the Board of Supervisors proceeded to take up and dispose of the independent application of Harvey, and a counter application made by one Ward, who contested Harvey's application. After having heard the testimony of the contesting parties, the Board awarded a license to Harvey. We are also called upon by Finch to review the action of the Board in this proceeding, on the ground that there was an excess of jurisdiction.

Finch's own application having been before rejected, it is not clear that he is in a position which entitles him to question the action of the Board in the proceeding on Harvey's application. His claim of precedence had been adjudged against him, and there was nothing in the way of granting a license to any suitable original applicant. He did not file any

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objections, or in any manner make himself a party to the application of Harvey. Ward contested it, but Finch did not. What right has he to complain? But conceding his right to be heard, we find no excess of jurisdiction. This was not an application for the establishment of another ferry within a mile above or below a ferry already established and licensed under the provisions of section six. It was an application for license to run a ferry at a point where there had been a lawful ferry, after the license for such ferry should have expired — to run a ferry at a point where there was no ferry authorized to be run during the same term for which the application was made. It was not contemplated that there would be two ferries. This not being an application under section six, the notice required by that section was not required. Still, to obviate all doubts, a notice of the intended application was actually served on Finch; but he did not see fit to appear and contest it. The proper petition was filed and due notice given. The Board thereby acquired jurisdiction of the subject matter, and, upon a full investigation of the contest between Harvey and Ward, found all the necessary facts (which were recited in the order) in favor of Harvey, and awarded him the license.

We think the Board of Supervisors regularly pursued its authority in both cases. Its action is therefore affirmed.

THE PEOPLE v. C. P. BURNEY.

WHEN CERTIORARI LIES.—The Supreme Court cannot, on certiorari, review mere errors of law of the County Court in cases where it has jurisdiction, even though there is no appeal.

JURISDICTION OF SUPREME COURT.—The appellate power of the Supreme Court does not extend to cases of misdemeanor.

CERTIORARI to the County Court of El Dorado County.

The facts are stated in the opinion of the Court.

S. & G. E. Williams, for the writ.

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J. G. McCullough, Attorney-General, for the People.

By the Court, SHAFER, J.

The defendant was convicted in the County Court of El Dorado County, for an alleged misdemeanor, and the proceedings have been certified to this Court on the petition of the defendant, and are now before us for review.

It appears from the record that the indictment was demurred to for want of facts, and on the ground that the Act on which it was founded was unconstitutional and void. The demurrer was overruled, and we are now asked to quash the proceedings on the ground that the decision was erroneous.

County Courts have jurisdiction in all cases of misdemeanor, and it therefore cannot be claimed that the Court in taking cognizance of the indictment in this case was guilty of any usurpation, nor do the counsel of the petitioner claim that the Court in any respect exceeded its powers, but that in the matter of its decision on the demurrer it mistook the law.

It is now too well settled to admit of argument that we cannot on certiorari review mere errors of law committed by an inferior Court, even though there be no appeal. The difficulty here, however, is not one of procedure merely, but comes of the fact that the appellate power of this Court does not extend to cases of misdemeanor.

The writ is dismissed.

Mr. Justice SAWYER expressed no opinion.

RACHEL BONDS v. L. M. HICKMAN.

METHOD OF TAKING AN APPEAL.—The filing of a notice of appeal in the Court below, and service of a copy of the same upon the opposite party or his attorney, is indispensable in order to enable the appellate Court to acquire jurisdiction of the cause.

AMENDING TRANSCRIPT IN SUPREME COURT.—The appellate Court may order a document to be inserted in or stricken from the transcript in order to perfect it, but it cannot vary or amend the document itself.

Argument for Appellant.

STIPULATION THAT NOTICE OF APPEAL WAS FILED.—If the attorney of the parties stipulate in the transcript that notice of appeal was filed in the Court below, and served, the Supreme Court cannot receive evidence contradicting the stipulation, and will not dismiss the appeal on the ground that no notice was in fact filed.

STIPULATION UNDER A MISTAKE OF FACT.—If an attorney stipulates, under a mistake of fact, that a notice of appeal has been filed, when no notice has been filed, the Court below, upon a proper application, may relieve him from it, but the Supreme Court cannot.

UNITED STATES PATENT.—A patent of the United States is not void because it is issued to the administrator of a deceased assignee of a military land warrant for land purchased by the administrator with the warrant.

SAME.—A patent of the United States cannot be attacked collaterally because it was issued to an administrator of a deceased person for land to which the deceased person had the right of pre-emption.

PRESIDENT MAY SIGN PATENTS BY HIS SECRETARY.—The laws of the United States allow the President to appoint a Secretary, whose duty it shall be to sign, in the President's name, all patents for land granted or sold by the United States.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

The plaintiff was the assignee of the grantee in the United States patent mentioned in the opinion of the Court. After the issuance of said patent the defendant purchased the land from the State and obtained a State patent for the same. This action was brought to annul and vacate the State patent. The Court below refused to admit the United States patent in evidence, and gave judgment for defendant, and plaintiff appealed. The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The facts stated in the stipulation give the Court jurisdiction; and whether the facts stated in the stipulation are true or not, cannot be inquired into by this Court on a motion to dismiss, but only on a motion to set the stipulation aside. A stipulation is something more than *prima facie* evidence of the truth of its contents. It is conclusive evidence, which cannot be counteracted as long as the stipulation is existent. The effect of a stipulation can only be avoided by addressing that coercive power which Courts hold over their attorneys, and procuring an order discharging each party from the effect

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thereof, except under such circumstances as were shown in *Budd v. Holden*, where the parties by a course of conduct in changing the issues in the case practically made the stipulation obsolete. (*Beck v. Lamont*, 13 How. 27; 32 Eng. Common Law, 415; 24 Id. 372; 2 New Hampshire, 521; *Smith v. Brannan*, 13 Cal. 115.)

The Court below erroneously excluded the United States patent offered by appellant in evidence. (Lester's Land Laws, 47, Sec. 6; Brightly's Digest, 474, Sec. 90; Id. 103, Sec. 44; Id. 98, Sec. 3.)

H. P. Barber, for Respondent.

By the Court, RHODES, J.

The attorneys of the parties appended to the transcript the following stipulation: "It is hereby agreed that the foregoing is a true copy of the pleadings, the patent of the United States referred to therein, the minutes of the Court, and judgment in said case, and that the case be argued thereon. Notice of appeal admitted as duly filed and served, also the filing of appeal bond, insertion of copies waived." The respondent moves that the appeal be dismissed on the ground that the Court had no jurisdiction of the case, because, as he alleges, no notice of appeal was filed. The motion is based on a certificate of the Clerk of the District Court, and an affidavit stating that in fact no notice of appeal was filed. In the counter affidavit filed by the appellant, it is not stated that a notice of appeal was filed; but he contends that the Court cannot go back of the stipulation — that the stipulation affords conclusive evidence that the notice was filed.

Filing of notice of appeal indispensable to perfect an appeal.

It is provided by section three hundred and thirty-three of the Practice Act, that "a judgment or order in a civil action, except when expressly made final by this Act, may be reviewed as prescribed by this title, and not otherwise;" and section

three hundred and thirty-seven provides that an appeal shall be taken by filing with the Clerk of the Court in which the judgment or order is entered, a notice of appeal, and serving a copy thereof upon the adverse party or his attorney. That is the only mode prescribed by the Act in which an appeal to the Supreme Court can be taken. The filing of the notice of appeal is indispensable, in order to enable the appellate Court to obtain jurisdiction of the cause. (*Hastings v. Halleck*, 10 Cal. 31; *Buffandeau v. Edmondson*, 24 Cal. 94.) A waiver of the filing by the stipulation of the parties is not the equivalent of the filing of the notice, for consent, though it may waive error, cannot confer jurisdiction. (*Coffin v. Tracy*, 3 Caines, 129; *Low v. Rice*, 8 John. 409; *Lindsay v. McClelland*, 1 Bibb, 262; *Ormsby v. Lynch*, Litt. Selec. Cases, 303; *Banks v. Fowler*, 3 Litt. 332.)

But this principle does not dispose of the difficulty in the case, for, admitting the necessity of the filing of the notice of appeal as an essential part of the proceedings by which the appellate Court acquires jurisdiction, the real question is what is competent evidence in this Court, to prove or disprove the filing of the notice. The notice itself, together with the official indorsement of its being filed, form a part of the record of the cause in the Court below, and neither of them have any place as original papers in the appellate Court. Causes brought before the Court by appeal are heard upon a transcript of the record of the Court below or a portion thereof, the transcript being made up and the documents of which it is composed being authenticated, before it reaches this Court. The evidence of the filing, as well as of the contents of the notice, constitutes an essential part of the transcript, for, as we have remarked, no provision being made for the filing of the notice in this Court, it cannot constitute a part of the record of this Court unless it appears in the transcript. A copy of the notice and the indorsement of its being filed, certified by the Clerk of the Court below, would, in the absence of a rule permitting a different mode of authentication, be the best evidence in this Court of the filing as well as of the con-

tents of the notice. The certificate of the attorneys of the respective parties is permitted by the statute to take the place of the official certificate of the Clerk, and parties may substitute a brief statement of the notice and its filing in the place of complete copies; but in whatever form they may appear and be authenticated in the transcript, they have the same value, and are entitled to the same effect as evidence, as if complete copies were certified to by the Clerk. We can see no ground upon which the copy certified to by the Clerk can be attacked by affidavits in this Court, that would not be equally available as a ground for attacking with the same weapons, the summons, judgment or any portion of the record found in the transcript. If the attorneys for the respective parties had inserted, in lieu of the summons and the Sheriff's return of service, now found in the transcript, a brief statement showing that a summons in the usual form was issued and duly served upon the defendant, and if the defendant had in this Court offered his affidavit to show that in truth the summons was not served, the question would be identical in substance with the one before us, and the solution of both would depend on the same principle, which is—that while the appellate Court may order a document to be inserted in or stricken from the transcript, in order to perfect the transcript, it possesses no authority to vary or amend the document itself.

The principle announced in *Buckman v. Whitney*, 24 Cal. 267, appears to be decisive of the question under consideration.

A stipulation in a transcript that notice of appeal was filed cannot be attacked by affidavits.

If the stipulation was entered into by the respondent under a mistake of fact, as he alleges in his affidavit, and its operation was injurious to him, doubtless it was competent for the Court below, upon a proper application, to relieve him from it (*Becker v. Lamont*, 13 How. Pr. 23) as this Court might do, if a stipulation were entered into here under a mistake of fact; but this Court is powerless in the premises, and cannot amend the documents constituting the transcript, nor indi-

rectly accomplish the same result by accepting as true a statement not found in the transcript, but which necessarily displaces a fact stated therein. While the stipulation remains, it affords sufficient evidence to this Court that the notice of appeal was filed in the Court below.

United States patent.

On the trial, the plaintiff offered in evidence the patent of the United States for the lands in controversy, which recited the location upon the lands, by James Smith, administrator of Robert Smith, deceased, of a military land warrant, which had been assigned to Robert Smith; and which granted to "James Smith, administrator of Robert Smith, deceased, as assignee as aforesaid, and to his heirs," the lands described. The patent was signed: "By the President, Abraham Lincoln. By W. P. Stoddard, Secretary."

The defendant objected to the patent on the following grounds: "First — That the said patent is void upon its face, and that it was located upon land on which it was not allowed to be located by law, under military bounty land warrants. Second — That it is void upon its face, as showing that it was issued to the administrator of a party deceased. Third — That it is not signed, nor does it purport to be signed, by the President."

Neither of the grounds of objection are, in our opinion, well taken. The patent is in the usual form of patents in case of the location by the assignee of a military land warrant, and contains nothing rendering it void on its face. Nor does it appear that the land granted was not subject to location under that class of warrants. We cannot hold it to be void because it was issued to the administrator of the deceased assignee of the warrant, for it is not forbidden by law to be so issued in such cases. It is not shown upon the face of the patent that it was issued for land to which the deceased had the right of pre-emption; and if such was in truth the case, though not recited in the patent, it is not liable to be attacked collaterally

Points decided.

on that ground. The last ground of objection is fully answered by Sec. 6 of the Act of Congress to reorganize the General Land Office (Brightly's Dig. 463; Lester's Land Laws, 47, Sec. 6), which provides that the President may appoint a Secretary, whose duty it shall be to sign in the President's name all patents for land granted or sold under the authority of the United States.

Judgment reversed and the cause remanded.

Mr. Justice SANDERSON expressed no opinion.

DAVID WOODS v. B. N. BUGBEY.

SALE AND MORTGAGE OF PERSONAL PROPERTY.—The validity of a sale of personal property, as between the vendee and an attaching creditor, when tested upon the question of the delivery and continued change of possession, is to be determined by the same rule whether the sale was absolute or made by way of mortgage to secure an indebtedness.

POSSESSION OF PERSONAL PROPERTY MORTGAGED.—The mortgagee of personal property, in order to place it beyond the reach of the creditors of the mortgagor, must have actual possession of the mortgaged property.

PURCHASER OF A KILN OF BRICKS.—The purchaser or mortgagee of a kiln of bricks, while being burned, must take that possession of the property which places him in the relation to the same that owners usually have to a like kind of property, in order to secure it against attaching creditors of the vendor.

CHANGE OF POSSESSION OF A KILN OF BRICKS WHEN SOLD.—If the owner of a kiln of bricks, before the burning of the same has been completed, makes a sale thereof in good faith, and for a valid consideration, to a creditor, and the vendor completes the burning of the kiln, exercising the same apparent control as before, the sale is to be deemed fraudulent as to an attaching creditor for want of a change of possession.

WHEN SALE OF PERSONAL PROPERTY FRAUDULENT.—The statute of this State makes a sale of personal property fraudulent and void as to creditors when there is not an actual and continued change of possession, and Courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser, or the good faith of the transaction.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

H. H. Hartley, for Appellant.

The cases of *Chenery v. Palmer*, 6 Cal. 119, and *Hackett v. Manlove*, 14 Cal. 9, lay down the doctrine that there is no difference between a sale and a mortgage of personal property, and that in both instances the act of sale or mortgage must be accompanied by an immediate delivery and actual and continued change of possession.

If, then, these authorities are law, the mortgage of plaintiff was absolutely void *ab initio*, because at the time of its inception no possession was taken under it. Section seventeen of the Statute of Frauds holds that no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, except in special cases. Now it is contended by the plaintiff that there is a difference between sales and mortgages—that in the former case the statute requires an immediate delivery, and that in the latter it does not, and that the delivery may be at any time. We insist there is no such distinction. The statute requires, in the case of mortgages, delivery and retention of possession, and surely that is intended to be immediate. (*Stewart v. Scannell*, 8 Cal. 80; *Vance v. Boynton*, Id. 554; *Van Pelt v. Littler*, 10 Id. 394; *Hurlburt v. Bogardus*, Id. 518; *Richards v. Schroeder*, Id. 431; *Stevens v. Irwin*, 15 Id. 504; *Engle v. Marshall*, 19 Id. 329.)

George Cadwalader, for Respondent.

There is no objection made to the ninth finding of the Court, "that all the transactions between plaintiff and Joseph O'Neill were *bona fide* and free from fraud." The kiln was the only security that plaintiff had for an advance of four thousand four hundred and fifty dollars; and if plaintiff had not intervened on the eleventh of November for the protection of O'Neill's credit, Harris would have attached not only the brick kiln, but so much of the wood as the attaching creditors had then delivered to O'Neill.

Argument for Respondent.

This case comes under the seventeenth section of the Statute of Frauds. This section has received the same construction as the fifteenth of the same Act, although there is a marked difference in their verbiage and the transactions to which they severally apply. Thus where a sale is made in good faith there is no reason for the vendor without interest retaining possession of the property sold. Not so, however, in cases of mortgage, where the mortgagor, of course, has a direct interest in the preservation of the property.

In regard to the delivery of ponderous articles, the authorities are unanimous that the rule thereof is different from that of portable property. These ponderous articles are generally substances that are not sheltered from the weather, but lie around loose on wharfs and in open lots, apparently unprotected and without an owner. Saw logs, piles of lumber, cord wood, pig iron, granite and stone in blocks, bricks, ore, and heavy castings, are in general the representatives of such property. (*Lay v. Neville*, 25 Cal. 545; *Chaffin v. Daub*, 14 Cal. 384.)

Chancellor Kent lays down the following rules with regard to bulky articles: "The consent of the parties upon the spot is a sufficient possession of a column of granite, which, by its weight and magnitude, was not susceptible of any other delivery, and possession was taken by the eyes and the declared intention." (4 Kent, 500.)

Again: "A bill of sale of timber and materials of great bulk, lying on the banks of a canal, or marking the timber, has been held to be a delivery sufficient to make the possession follow the right; it was as complete a delivery and possession as the subject matter reasonably admitted." (Id. 501; *Manton v. Moore*, 7 Term., 67.)

In the case of *Leonard v. Davis*, 1 Black, 482, the question of delivery between buyer and seller was raised of a quantity of saw logs floating in a boom, which the Court disposed of by saying: "While floating in the water they were only in the constructive possession of the owner, and under such circumstances a symbolical delivery is all that can in general be

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expected, and is amply sufficient to pass the title." (*Ludwig v. Fuller*, 17 Maine, 166; *Boynston v. Veasil*, 24 Id. 288; *Macomber v. Parker*, 13 Pick. 175; *Hutchings v. Gilchrist*, 23 Vt. 88; *Gibson v. Stevens*, 8 How. 384.)

By the Court, CURREY, J.

The plaintiff brought his action to recover damages against the defendant for seizing and taking a kiln of bricks alleged to be the property of the plaintiff, and of the value of five thousand six hundred dollars. The defendant justified his acts on the ground that the property belonged to Joseph O'Neill, and that the defendant as Sheriff of the City and County of Sacramento seized and took the same by virtue of certain writs of attachment issued in actions brought by divers creditors of O'Neill, and that said property was so seized and taken as the property of O'Neill, and was in fact his property at that time and liable to be levied on under and by virtue of said writs of attachment and to be held thereunder to satisfy any judgments which might be recovered in the actions in which such writs of attachments were issued.

The plaintiff claimed to own the kiln of bricks in question as the purchaser thereof from O'Neill; and the defendant as Sheriff, representing the attaching creditors, controverted the plaintiff's right to the same on the ground that the sale thereof by O'Neill to him was, as to the creditors named, void by the Statute of Frauds. The cause was tried by the Court without a jury. Judgment was rendered for the plaintiff. The defendant moved for a new trial which was denied.

The Court found that on the 22d of October, 1861, O'Neill was the owner of a kiln of green or unburned bricks, which was then nearly completed, and that on that day, being indebted to the plaintiff in the sum of three thousand two hundred dollars, the former executed and delivered to the latter, as security therefor, a bill of sale of said kiln of bricks, and in the same instrument further agreed, in consideration of said indebtedness, to proceed as soon as practicable to burn

said kiln at his own expense. At the time of the execution of this instrument the kiln of unburned bricks was not of the value of the consideration expressed. The plaintiff did not attempt to take possession of the property at that time. On the 11th of November thereafter one Harris, to whom O'Neill was indebted in the sum of two thousand three hundred dollars, threatened a suit for its recovery, when the plaintiff and another person became sureties for its payment, upon which O'Neill, for the purpose of securing the plaintiff against loss on account of this contingent liability, as well as for the amount already due him, made to the latter a formal delivery of the kiln of bricks, by declaration on the ground where it stood, in the presence of a witness, that he delivered the same to him for the purpose stated. At that time the burning of the kiln had been commenced. O'Neill thence remained in possession of the kiln, attending to the burning of it, and for that purpose employed hands, whom he paid. He also purchased wood with which to burn the kiln. All this was done by O'Neill at the plaintiff's request and in pursuance of their agreement made on the 22d of October. O'Neill completed the work of burning the kiln on the 19th of the same November, and on the following morning, before the property was attached, informed the plaintiff thereof and told him to take his property. At some time afterward, on the same day, the property was attached by the defendant. Three days after this the plaintiff served on the defendant a notice that he was the owner of the property and entitled to its possession, and by the same means demanded of him to deliver it to the plaintiff. At the time of attaching the kiln O'Neill was not there. The kiln which was one hundred and thirty feet long, thirty feet wide and fifteen feet high, was then and for several days after too hot to be removed. During the period from the 11th to the 19th of November and while the bricks were in process of burning, the plaintiff was at the kiln five times, but did not notify any one about the premises of his claim. The Court further found that the plaintiff at the time of the trial had paid half the sum due from O'Neill to Harris; that he had not

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received anything on his demand of thirty-two hundred dollars; that he and O'Neill believed the bill of sale was operative and valid as a security in his hands, and that all the transactions between them were *bona fide* and free from fraud. The Court further found that it was not indispensably necessary that O'Neill should have continued in charge and possession of the kiln of bricks after the 11th of November, but that plaintiff could have obtained competent persons to have superintended and performed the work and procured the wood necessary for burning the kiln, and that the work and labor performed by O'Neill, including the wood furnished by him, enhanced the value of the kiln of bricks. The Court further found that after the 11th of November there was no change in the possession and management of the property from that which existed before then. That from that date to the 19th of the same month inclusive, O'Neill used and controlled the property as before then, and that the "plaintiff had done no acts to give notice or notoriety to his possession of the property."

The counsel for the respective parties are not entirely agreed as to the character of the transaction between O'Neill and the plaintiff—that is, whether it was a sale or a mortgage. It was the one or the other, and it matters not which, because, in either event, the principle upon which the case depends is the same. The property in question was of a character that could not be transferred from the vendor to the vendee, or from the mortgagor to the mortgagee, by a manual delivery, and as between the parties the transfer attempted to be made may be considered as sufficient to pass the interest intended to be transferred; but as to the creditors of O'Neill the transaction must be determined by reference to the provisions of the Act concerning fraudulent conveyances and contracts, the fifteenth section of which reads as follows: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of

the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith;" and the seventeenth section of which reads as follows: "No mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." (Laws 1850, p. 267.)

If the instrument executed on the twenty-second of October, and the transactions which transpired then and subsequently on the eleventh of November, be considered a sale of the kiln of bricks, then, in order to protect the property from the creditors of the vendor, the vendee was bound to take possession of it and thence continue in its actual possession. The words "actual possession" contained in the statute are used in contradistinction to constructive possession, which is an incident of and dependent on right and title. If the same instrument and transaction be considered a mortgage, then to make the mortgage valid as to any other persons than the parties thereto, the property should have been delivered to and retained by the mortgagee. The kind of possession which it was necessary for the mortgagee to have of the mortgaged property to place it beyond the reach of the creditors of the mortgagor was an actual possession; otherwise the seventeenth section of the Act would be without any efficient meaning, and would wholly fail to accomplish the useful purpose for which it was designed. What constitutes an actual and continued change of possession is well stated in *Stevens v. Irwin*, 15 Cal. 506; and in *Godchaux v. Mulford*, 26 Cal. 323. What acts will amount to an immediate delivery and an actual and continued change of possession of personal property of a cumbrous and ponderous nature—such as a kiln of bricks—must depend in a great degree upon the circumstances of the particular case, as was said in *Lay v. Neville*, 25 Cal. 552; but care should be taken in such cases to keep in view the object of the statute, and to exact nothing less than a substan-

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tial observance of its salutary provisions. In no case that we are aware of has the Supreme Court of this State laid down a rule requiring less than that the purchaser must have that possession which places him in the relation to the property which owners usually are to the like kind of property. In *Lay v. Neville* the Court, in reference to the subject, say: "It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control and ownership, as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property." In this case O'Neill was permitted to remain in the possession of the property, for the purpose of burning the bricks — and for aught that could have been seen by the most vigilant he owned it as absolutely and exclusively as he would if nothing had transpired between him and the plaintiff. He employed hands to assist him in the work, and purchased fuel with which to burn the kiln, and in all things, to outward appearances, conducted himself as the owner of the property. There was nothing done by the plaintiff to indicate to any one that he had any property in the kiln of bricks, notwithstanding he visited the premises five times while the bricks were in process of burning. The fact that O'Neill finished the work of burning the kiln the day before it was attached, and informed the plaintiff the next day before the Sheriff levied that he had completed the work and told him to take his property, does not, in our judgment, aid the plaintiff. O'Neill had been all the while, from the time of his contract with the plaintiff, in the actual and open possession of the property, adding by his labor, care and skill to its value, and this, too, by an arrangement made by him with the plaintiff. After he had done his work, he gave the plaintiff notice that he had completed his part of his contract, and told him to take the property. This was the first time it was ever proposed to make a complete and final delivery of the

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property, which, if it had been effectuated, would have amounted to an open and visible change of the possession. After this information and notice, there was nothing done to manifest or render it evident that the possession of O'Neill had ceased, or that the plaintiff had acquired the actual possession of the property. We think the case clearly within the mischiefs, to prevent which the statute was passed, and that judgment ought to have been for the defendant instead of the plaintiff.

The judgment is therefore reversed, and the Court below directed to enter judgment for the defendant.

Mr. Chief Justice SANDERSON expressed no opinion.

[The foregoing opinion was delivered at the October term, 1865. On petition for a rehearing, the following opinion was delivered at the January term, 1866.—REP.]

By the Court, CURREY, C. J.

We have examined the plaintiff's petition for a rehearing and the authorities to which reference is therein made. Much is said in the argument which accompanies the petition in relation to a constructive delivery and possession of personal property of a cumbrous and ponderous nature. It was quite unnecessary to make an issue with the Court upon the language used in the opinion delivered, as to the necessity of an immediate delivery and an actual and continued change of possession of the property in controversy, in order to satisfy the requirements of the Statute of Frauds. The distinction between an actual and a constructive possession was therein referred to and explained. In the sense of the terms "immediate delivery" and "actual and continued change of possession," employed in the statute, a delivery and possession of cumbrous articles of personal property may be fully consummated. The mode and manner are indicated in the opinion and by the cases of *Stevens v. Irwin* and *Lay v. Neville*, therein referred to. The plaintiff's counsel is quite mistaken in sup-

posing that we overruled *Godchaux v. Mulford*, *ex necessitate*, by anything said in our opinion in this case. In that case it is distinctly held that the vendor "cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that," it is said, "would be inconsistent with such an open and notorious delivery and actual change, as the statute exacts, in order to exclude from the transaction the idea of fraud." The Court found that from the time of the verbal delivery of the property there was no change in the possession and management of it from that which existed before then, and that from that time until the burning of the kiln of bricks was completed, O'Neill used and controlled the property as he had done before the sale or assignment; and further, that the plaintiff had done no acts to give notice or notoriety of his possession of the property. The facts so found rendered the transfer of the property invalid as to creditors, not only within the rule prescribed by the statute, but also in accordance with the doctrine declared in *Godchaux v. Mulford*.

The rule which our statute prescribes admits of no excuse dispensing with an actual and continued change of possession of the property sold, assigned or mortgaged, in order to place it beyond the reach of the creditors named therein, and when consulting the decisions of other Courts than our own it should be remembered that we have a statute more definite and exacting than those under which the decisions of such other Courts were made. The statute of 13th Elizabeth contained no provisions similar to the fifteenth and seventeenth sections of our Statute of Frauds, but it did contain a provision, of which the twentieth section of our statute is in substance a transcript. Under that Act the Courts held that the continuance of the vendor in possession after sale, was presumptive evidence that the sale was designed to hinder, delay and defraud the creditors of the vendor. In *Edwards v. Harben*, 2 T. R. 587, it was the unanimous opinion of the Court that, unless possession accompanies and follows the sale, it is fraudulent and void. In that case, the Court held that where there

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was nothing but an absolute conveyance, without the possession, the want of possession was not merely evidence of a fraudulent sale, but that the sale was to be deemed fraudulent in law. But upon this point the tendency of the later decisions of the Courts of Westminster Hall has been to qualify and perhaps to overthrow the doctrine declared in *Edwards against Harben*, and to leave the entire circumstances of each case to the jury to decide whether the presumption of fraud to be deduced from a want of change of possession should prevail. In the American States the decisions of the Courts respecting sales and mortgages of chattels without a transmutation of possession, have been various and diverse. In some States the principle has been established that unless possession follows the sale, the sale is by the statutes 13th and 27th Elizabeth to be held fraudulent in law and void as to creditors and subsequent *bona fide* purchasers; while in others it has been held that the vendor's retaining possession inconsistently with the conveyance is only *prima facie* evidence of fraud which may be rebutted. That the question of fraud is one of fact to be passed upon by the jury. In *Hamilton v. Russell*, 1 Cranch, 97, Mr. Chief Justice Marshall approved and adopted the doctrine laid down in *Edwards v. Harben*, holding that an "unconditional sale, where the possession does not accompany and follow the deed, is, with respect to creditors, on the sound construction of the statutes of Elizabeth, a fraud, and should be so determined by the Court." Such a deed, he said in the same case, must be considered as made with an intent to delay, hinder and defraud creditors. In *Meeker v. Wilson*, 1 Gallison, 423, Mr. Justice Story followed the Court in *Hamilton v. Russell*. In both these cases it was said the statute of 13th Elizabeth was only declaratory of a principle of the common law. The decisions made under the statutes of 13th and 27th Elizabeth observe a distinction between a sale absolute in terms and one made upon condition which does not entitle the vendee to immediate possession. Without discussing or explaining the principle on which the distinction is founded, we may say it was long ago discovered that sales upon terms

apparently consistent with the continued possession of the vendor might be and were made an effectual means of accomplishing frauds against the creditors of the vendor. We may remark, at this point, that our statute has abolished all distinctions between absolute and conditional sales.

The Courts which have attempted to follow the doctrine of *Edwards v. Harben* have necessarily been much embarrassed by the many exceptions to the rule there laid down. The Statute of 13th Elizabeth was re-enacted in New York in 1787. In *Sturtevant v. Ballard*, 9 John. 337, Mr. Chief Justice Kent, in an effort to introduce the rule declared in *Edwards v. Harben* and *Hamilton v. Russell*, into the jurisprudence of his State, found it encumbered with eight exceptions, and by subsequent decisions of the Courts of England and of the several States of America the exceptions became multiplied until in the year 1824, Judge Cowen, then Reporter, in an elaborate note to the case of *Bissell v. Hopkins*, 3 Cow. 189, particularly enumerated and considered twenty-four. Upon which, as if in despair of ascertaining the status of the law on this subject so fruitful of controversies, he said: "When we look at the nature of the twenty-four different exceptions to the rule in *Edwards v. Harben*, which are above enumerated, it is time to ask what does the rule amount to? What is it worth? And does its preservation deserve a struggle? Some of the exceptions are almost as broad as the rule itself. The nature of the instrument of sale, the kind of sale, whether directly between the parties, or on execution, or distress for rent, necessity, convenience, customs of doing business, the nature, quantity, relative value, distance, and place of the articles sold, the consideration, the relation of the parties, honesty, fairness, humanity, friendship, special circumstances, special reasons, etc., etc., have in their turn been called in by the different cases to fritter down the rule. Sometimes the attempt to apply it strikes the Judges with such evident absurdity that they no longer proceed by way of exception. Instead of attempting to untie, they cut the knot at once by denying the existence of the rule." So the law on this subject remained

in New York, except perhaps the engrafting upon the rule a few more exceptions, until in December, 1827, an Act concerning fraudulent conveyances and contracts was passed, which, however, did not go into effect until the first of January, 1830. By this Act it was attempted to establish a rule settling for the future the controversies which, by diverse and conflicting opinions of Judges, had become inveterate to a degree rendering it doubtful at least whether any stable rule existed for the prevention of frauds upon creditors by pretended transfers of personal property. But the rule established by the New York Act failed to prevent the frauds against which the statutes 13th and 27th Elizabeth were aimed, as the judicial history of that State since the Act went into effect abundantly attests. The fifth section of the New York Act, in its phraseology, bears a resemblance in part to the fifteenth section of our statute, but its import is very different. The fifth section referred to reads as follows: "Every sale made by a vendor, of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors and purchasers." By the section here quoted, the want of an immediate delivery, and thereafter an actual and continued change of possession of the things sold, mortgaged or assigned, raised a presumption only that the transaction was fraudulent and void as to creditors, etc. The fact in the first instance presumed became a matter conclusively established by the fact of a want of delivery and an actual and continued change of possession, provided it was

not made to appear that the sale, mortgage or assignment was made in good faith and without intent to defraud such creditors and purchasers. The fifteenth section of our statute declares that a sale or assignment so made, unless it be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such sale or assignment, or subsequent purchasers in good faith. Our statute, it will be observed, makes that conclusive evidence which the New York Act makes only presumptive evidence. The New York Act not only permits but suggests that the party claiming under the sale or assignment impeached for want of a delivery and an actual change of possession, may "make it appear that the same was in good faith and without intent to defraud creditors and subsequent purchasers." Our statute admits of no explanation excusing the delivery and change of possession. Therein is the difference, which it is manifest the Legislature intended in order to exclude all inquiry as to the consideration paid by the purchaser, or as to his motives and intentions in the premises. If in fact there was not an actual and continued change of possession given, the statute pronounces the transfer fraudulent as to creditors, and the Courts have no right to seek to evade its force and effect. No excuse or explanation for want of an actual and continued change of possession can be entertained, and it is quite useless to cite decisions made under the statutes of Elizabeth and of New York, or other States, allowing the want of an immediate delivery and an actual and continued change of possession to be explained or accounted for as authoritative expositions of the rule which our statute has prescribed.

The rehearing must be denied.

Mr. Justice SANDERSON expressed no opinion.

THE PEOPLE v. ANTONIO SASSOVICH.

CONSTITUTIONALITY OF LAWS.—An Act deliberately passed by the Legislature must be regarded by the Courts as valid unless it is clearly and manifestly repugnant to some provision of the Constitution.

NUMBER OF JUDICIAL DISTRICTS IN THIS STATE.—Section five of Article VI of the Constitution does not restrict the number of judicial districts in this State to fourteen, provided the number is increased by a two-thirds vote of the Legislature.

THE TITLE TO AN OFFICE CANNOT BE QUESTIONED COLLATERALLY.—One entering into the possession of the office of Judge of a District Court, by color of right, becomes a Judge *de facto*, and his title to the office can be questioned only by an action brought directly for that purpose.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The appellant was tried in the Fifteenth District Court, in and for the City and County of San Francisco, at the June term of said Court, 1865, for the crime of murder, was found guilty by the jury of murder in the first degree, and sentenced to be hung.

Prior to judgment, appellant moved said Court in arrest of judgment upon two grounds:

First—That there is no such Court as the Fifteenth Judicial District Court of the State of California legally in existence, because the Constitution of the State limits the number of judicial districts to fourteen, and the Legislature has no power to increase or diminish them.

Second—That the Governor of California had no authority under the Constitution to appoint Hon. S. H. Dwinelle to act as Judge of said Court, admitting the same to be legally organized by the Act of the Legislature of 1864, and therefore the trial and conviction of appellant was *coram non judice*.

The Court denied the motion in arrest of judgment, to which ruling the defendant excepted.

George W. Tyler, for Appellant.

I contend that the number of judicial districts in this State is fixed by the Constitution at "fourteen," and that the number cannot be increased or diminished by the Legislature.

Argument for Respondent.

That the number of districts to which the State must be divided into is fourteen, no one will deny. That the Legislature is not given the power to increase or diminish that number in express terms, is apparent upon the face of the instrument. If the power exists it must be implied from the language used. It can be implied from no other word than that of "alteration." Something is "subject to alteration." What is it? Why, the "fourteen judicial districts." The Legislature can alter these districts "from time to time," that is, take a county from one and add to another, or provide for the organization of new counties, and place them in either of the districts at pleasure, "as the public good may require," but they cannot interfere with the number.

The meaning of the word "alteration" is, "the act of making different, or of varying in some particular; an altering or partial change; also, the change made or the loss or acquisition of qualities, not essential to the form or thing." It applies to an article or thing already in existence, and in which article or thing some partial change is made. Power to alter cannot imply power to create. They are as distinct and different as it is possible to imagine.

John W. Dwinelle, for Respondent.

The appellant insists that the number of districts was limited by the above section to fourteen, and that the power of alteration therein conferred on the Legislature applies solely to the boundaries of the districts so established; the respondents contend that such power of alteration extends to the number of the districts, so that the Legislature could, under the terms of the Constitution, increase the number of districts beyond the original number of fourteen.

What is the substantive matter of the provision under consideration? It is simply legislating concerning the number of judicial districts which were then to be created for the State of California. The Legislature were to begin with the number of fourteen. It was the number of districts which was

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the subject matter of this constitutional legislation, and to that number, therefore, the qualifying phrase "subject to such alteration from time to time," must refer to its antecedent. The phrase "districts" is a mere qualification of the number. Fourteen what? "Into a number of districts, which shall be fourteen," is the answer; and that is the full reading of the phrase, the word "number" being understood. So stands the result of logical analysis.

By the Court, SANDERSON, J.

The following points are made upon this appeal:

1. That the Act of the 4th of April, 1864 (Statutes of 1863-64, p. 497), by which the number of judicial districts was increased to fifteen is in conflict with the fifth section of the Sixth Article of the Constitution, and therefore null and void.

2. That admitting the Act in question to be constitutional, so far as the creation of the Fifteenth Judicial District is concerned, the Governor had no power, under the Constitution, to appoint and commission a Judge of the Court thereby created, as required and directed by the sixth section of said Act.

The rules by which Constitutions are to be construed when the validity of an Act of the Legislature is brought in question were elaborately considered by us in *Bourland v. Hildreth*, 26 Cal. 180-225, and therefore need not be specially considered in this place. It is well settled that every Act deliberately passed by the Legislature must be regarded by the Courts as valid unless it is clearly and manifestly repugnant to some provision of the Constitution. The people must not be deprived, by judicial construction, of their prerogative right to declare, through the Legislature, what shall be the rule in a given case upon the mere conjecture or suspicion that they have already declared their will upon that subject in the Constitution. Nothing short of a constitutional prohibition, so explicit and clear as to leave no reasonable doubt

upon the mind, can justify the Courts in declaring an Act of the Legislature null and void. If, in the presence of opposing reasons the judicial mind, guided by legal rules of construction, hesitates, the question is already decided and a conclusion is already reached.

The language of the Constitution which the present case presents for construction, is as follows:

“ART. 6, SEC. 5. The State shall be divided by the Legislature of 1863 into fourteen judicial districts, subject to such alteration from time to time, by a two-thirds vote of all the members elected to both Houses, as the public good may require.” * * * *

It is claimed on the part of the appellant that the number of the districts is permanently fixed and established by the foregoing provision of the Constitution, and that the Legislature therefore has no power either to increase or diminish it.

In support of this construction we must confess that counsel for the appellant has filed an able and ingenious argument, but in our judgment it lacks that conclusiveness which the rule of construction already suggested demands. The argument is drawn mainly from the rules of syntax, and chiefly turns upon the question as to what is the antecedent of the qualifying phrase, “subject to such alteration,” etc. And it is claimed that the antecedent of that phrase finds full expression in the single word “districts.” That such is the case, when considered in the light of the strictest rules of syntax, cannot be affirmed beyond all reasonable doubt, in our judgment.

A qualifying phrase does not always bear relation to a single word, noun or pronoun, as its antecedent; on the contrary it may, and frequently does, have another phrase or sentence as its object of relation. Treating the question, then, as a question in grammar only, may it not be claimed with equal certainty that the entire phrase “fourteen judicial districts” is the antecedent of the phrase “subject to be altered.” If so the word “fourteen” is brought within the operation of

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the words "to be altered" or "alteration," to use the precise word employed in the Constitution, and is qualified thereby. Thus the exact antecedent of the phrase in question may be found in a full answer to the question, "what is to be subject to alteration?" which answer is, "the fourteen judicial districts." If the entire expression "the fourteen judicial districts" may be taken as the grammatical antecedent of the qualifying phrase in question it follows that the Legislature may "alter" the number of the districts as well as their extent.

But it is claimed that to thus interpret the word "alteration" is to strip the verb "to alter" of its own appropriate sense and to use it in the sense of "to create." The criticism, however, is without substance. "To alter" is "to change." While it might be more exact, when speaking of a number with a view to its change, to employ the words "increase" or "diminish" it cannot be affirmed but their places may be efficiently filled by the words "to change" or "to alter." On the contrary each of the two latter are more comprehensive terms and embrace both of the former. It is not a violation of usage, which is the law of language, to speak of the increasing or diminishing of a given number as a change or alteration of the number, although perhaps less exact than the words "increase" and "diminish." Were one to speak of the change or alteration of the number of the districts or counties of the State, there could be no doubt as to his meaning, nor could his language be made the subject of just criticism.

But without dwelling further upon this line of argument it is sufficient to say that all questions depending for their solution mainly upon the rules of syntax must be solved more by mere intuition than by reasoning and deduction. In such cases the view is generally limited to a single sentence or a phrase. We read the disputed passage and the mind intuitively perceives that its meaning is obvious or doubtful, or that from a want of exactness in its terms, it is susceptible of two readings. The one or the other conclusion is reached immediately without the intervention of other ideas brought

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into play by some process of reasoning upon the meaning and collocation of words.

So it is in the present case. We have carefully read the language in question and are not prepared to say, beyond all reasonable doubt, that the legislative construction is not correct.

A further argument in support of our conclusion might be drawn from a comparison of the language of the old Constitution with that under consideration, and a reference to the construction of the former, as universally recognized and sanctioned by every department of the State government from its foundation until the recent change in its fundamental law; but we deem further discussion unnecessary and are content to leave the question at the point already reached.

That the second point cannot be sustained in this action does not admit of debate. The person who filled the office of Judge at the time this case was tried was appointed and commissioned by the Governor under and in pursuance of the provisions of the Act in question. He entered therefore under color of right and title to the office, and became Judge *de facto* if not *de jure*, and his title to the office cannot be questioned in this collateral mode. (*The People v. White*, 24 Wend. 539; *McInstry v. Tanner*, 9 John. 133; *Hildreth's Heirs v. McIntire's Devisee*, 1 J. J. Marshall, 206.) His title can only be questioned in an action brought directly for that purpose as provided in the fifth chapter of the Practice Act. The acts of *de facto* officers must be held valid as respects the public and the rights of third persons. A contrary doctrine, for obvious reasons, would lead to most pernicious results.

The judgment is affirmed and the Court below is directed to appoint a day for the execution of its sentence.

Argument for Respondents.

JAMES G. FAIR v. GABRIEL STEVENOT *et als.*

NOTICE ARISING FROM POSSESSION UNDER AN UNRECORDED DEED.— Possession of real estate by the grantee in a prior unrecorded deed is not of itself conclusive notice of the grantee's title to a subsequent purchaser whose deed is first recorded, but such possession is only evidence tending to prove notice.

SAME.— If the grantee in a prior unrecorded deed relies alone on the fact of possession of the property sold, to show notice to a subsequent purchaser whose deed is first recorded, the subsequent purchaser may show in rebuttal that he used due diligence in making inquiry and failed to attain a knowledge of the prior unrecorded deed.

SAME.— Open, notorious, and exclusive possession of a prior grantee in an unrecorded deed is sufficient to put a subsequent purchaser whose deed is first recorded upon inquiry, and such possession is sufficient evidence of notice, unless the subsequent purchaser after making due inquiry fails to attain a knowledge of the unrecorded deed.

A PRIOR DEED NOT CONCLUSIVE AS TO TITLE.— A deed which has been recorded is not conclusive evidence of title in the grantee, as against a grantee in a prior unrecorded deed who is in possession.

CONSOLIDATION OF CAUSES IN SUPREME COURT.— If the plaintiff and defendant each appeal from different portions of the same judgment, and the parties do not stipulate that either transcript may be added to the other, each appeal must be heard on its own transcript.

APPEAL from the District Court, Eleventh Judicial District, Calaveras County.

The Court gave judgment in favor of plaintiff for six sevenths, and in favor of defendants for one seventh of the quartz ledge, the property sued for.

The other facts are stated in the opinion of the Court.

J. P. Barber, for Appellant.

Sloan & Provines, for Respondents.

The fact stated is that "Morgan was an owner and in possession of his interests in the mine, superintending and working the same through himself or his agents." How was Morgan in possession? The answer is: "Through himself or his agents." This may be true, although Morgan, in person, never came within one hundred miles of the mine. The statement of Morgan's possession discloses no fact from which notice can be inferred.

By the Court, RHODES, J.

The plaintiff appealed from that portion of the judgment, which was entered in favor of the defendant for one seventh of the premises sued for. This appeal and the appeal designated as No. 369 are taken from different portions of the same judgment. The first appeal was heard upon the judgment roll alone, and this cause is presented on a statement on appeal filed by the plaintiff, to which is attached a stipulation, by which it is agreed, among other things, that the cause "may be argued on the foregoing statement." The causes have not been consolidated in this Court, and the parties have not stipulated that either transcript may be added to the other, and this cause must be heard on the transcript filed herein, without the aid of that filed on the appeal taken by the defendants.

The rehearing was granted in this cause mainly that a re-argument might be had upon the question of notice to the defendants of certain unrecorded deeds under which the plaintiff claims, made prior to the deed under which the defendants claim.

It appears from the statement, that the deeds to Morgan, under whom the plaintiff claims, all of which were executed prior to the year 1858, were recorded on the 17th day of October, 1860; and that the constable's deed under which the defendants claim was executed July 7th, 1859, and was recorded on the 22d day of September following; and that the constable's sale, in pursuance of which the deed was executed, took place on the 28th of December, 1858. The statement does not contain a finding of the facts nor the evidence, except certain portions of that introduced by the defendants, to which objections were taken by the plaintiff, but certain facts are stated as facts in the case. It is stated as a fact that "Morgan was an owner and in possession of his interests in the mine, superintending and working the same through himself or his agents from the year 1851 to the time of the eviction by the defendants or their grantors in 1859." The only interest in the mine that is stated in the transcript to have

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vested in Morgan was the interest of Rowe, which was the undivided one seventh of the mine. It further appears that in the progress of the trial "the Court decided that as the various deeds of Rowe's interest vesting the same in Morgan were not recorded until after the constable's deed to the execution creditors, who became purchasers under such execution for the amount of their judgment, said execution creditors and purchasers were subsequent *bona fide* purchasers, for a valuable consideration without notice; that their deed, being first recorded, had priority over Morgan's subsequently recorded deed, and entitled them to Rowe's interest of the one seventh so purchased by them at the constable's sale, to which decision plaintiff then and there excepted."

Possession under an unrecorded deed evidence tending to prove notice.

The plaintiff's position is that the possession of Morgan, in the manner set forth in the statement, was notice of his unrecorded deeds, and the defendants contend that it was merely evidence tending to prove such notice.

No case has heretofore been before the Court requiring a decision of the precise question now presented. Notice of the existence of a deed is of two kinds, actual or constructive. Neither the cases nor the text writers altogether agree in their classification of notices. In most cases, all descriptions of notices except positive—those in which the knowledge of the deed is brought directly home to the party—are held to be included among constructive notices; but in others, all notices that are not deduced as conclusive presumptions of law arising from a given state of facts, are considered to fall within the class of actual notices. (Sto. Eq. Juris. Sec. 399; *Dey v. Dunham*, 2 John. Ch. R. 182; *Grimstone v. Carter*, 3 Paige, 421; *Jackson v. Van Valkenberg*, 8 Cow. 260; *Tuttle v. Jackson*, 6 Wend. 213; and see also *Williamson v. Brown*, 15 N. Y. 854, in which Mr. Justice Selden ably reviews the authorities on this question.)

A recorded deed is an instance of constructive notice, and upon proof being made that it has been duly recorded, the

presumption of notice to the subsequent purchaser arises, and the presumption is a conclusive presumption of law, and no opposing evidence is admissible. But whether the notice of the unrecorded deed, implied from the fact of possession of the premises by the grantee, may properly be included within the one or the other of the kinds of notice, it could not be maintained, nor is it in any case said, that upon proof of such possession the opposite party is precluded, as in the case of the recorded deed, from offering any evidence to repel the implication of notice, nor that the implication arises from the single fact of possession, independent of any other fact in the case. If this be true, the presumption is not a conclusive presumption; and the fact of possession is only evidence tending to prove notice. Neither the recorded deed in the one case, nor the possession of the grantee of the unrecorded deed in the other, is the ultimate fact, but *notice* is the ultimate fact to be established by the evidence. Upon proof being made of the record of the deed, the notice necessarily results by operation of law; but not so upon proof of possession, for the possession may be taken and held in such various modes, and accompanied by so many qualifying circumstances, that each case must depend upon its own peculiar features, and therefore proof of possession is not of itself decisive without regard to the other facts of the case.

This becomes apparent upon noticing one of the many cases that will readily occur to the mind. The general rule is — except in cases of conclusive presumptions, like the recorded deed, actual notice of the deed to the agent of the subsequent purchaser, the recital in his deed of a former deed, etc. — that whatever puts the party upon inquiry, provided inquiry becomes his duty, is in judgment of law notice to him. Take the case where the holder of the unrecorded deed is personally in the open, notorious and exclusive possession of the premises, and who upon inquiry being made as to his title, asserts a claim derived from a hostile source; or the case where the person apparently in possession is subsequently shown to be

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the servant of the owner, and who refuses to answer any inquiry concerning the title by which he holds; in neither case will notice be implied. And so in every case, where possession in any of its various characters is proven, if the facts of the case are not sufficiently certain as to time, place, persons and circumstances, to put the subsequent purchaser upon inquiry; or if, after having pursued the inquiry with proper diligence, he fails to attain the knowledge of the unrecorded deed, notice will not be presumed. Notice, therefore, is the ultimate fact to be proven, and possession is evidence upon that issue, and it may or may not be sufficient, according to the circumstances of the particular case; it being understood, of course, that the open, notorious and exclusive possession of the prior purchaser is sufficient to put the subsequent purchaser upon inquiry, and from that fact alone, notice of the unrecorded deed should be found, unless he shows that he pursued the inquiry with proper diligence, and failed to attain knowledge of the deed. (See *Kendall v. Lawrence*, 22 Pick. 544; *Bell v. Twilight*, 2 Foster, N. H. 518; *McMechan v. Griffing*, 3 Pick. 155; *Williamson v. Brown*, 15 N. Y. 354.)

It was held in *Hunter v. Watson*, 12 Cal. 376, "that the open notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser, of the first vendee's title;" and it was so decided also in *Stafford v. Lick*, 7 Cal. 489. Mr. Chief Justice Field says, in *Lestrade v. Barth*, 19 Cal. 676: "This possession and occupation were sufficient to put the purchaser upon inquiry as to the interest, legal or equitable, which the defendant held in the premises, and that inquiry should have been made of the defendant thus in the possession and occupation." If is not said, however, that the possession was *per se* notice, and if it could be so held, the inquiry incumbent upon him would be useless, for he would be chargeable with notice, whether the inquiry could or could not result in a discovery of the real facts of the case. In *Dutton v. Warschauer*, 21 Cal. 627, some of the language of the Chief Justice is broad enough to express the idea that possession amounted to notice, but the

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context itself clearly shows, as does the concurring opinion of Mr. Justice Norton, that it was only intended to be said, that the possession of the defendant in the case, open, notorious and exclusive as it was found to have been, was sufficient to put the subsequent purchaser upon inquiry, as to the interest held by the defendant.

In this case, as presented to us, there is the single fact that Morgan was in possession of his interests in the mine, superintending and working the same through himself or his agents, but the evidence on that point is not given, nor does it appear that the Court found that the defendants did or did not have notice of Morgan's deeds. If the evidence were all before us, in respect to Morgan's possession, and the inquiry, if any, instituted by the defendant, it would not be proper for us to assume the functions of the District Court, and find the facts of the case.

The defendants must prevail, unless they had notice of the unrecorded deeds to Morgan; but it appears from the case, as presented in the transcript, that the Court below wholly disregarded the evidence establishing the fact of Morgan's possession, and gave priority to the constable's deed, through which the defendants claim, solely on the ground that it was first recorded. This was error, for the fact stated in relation to the possession of Morgan, tended to prove notice to the purchasers at the constable's sale, and priority should not have been assigned to the constable's deed, because first recorded, irrespective of the question of notice to the purchasers, of the existence of Morgan's deeds.

Judgment for the defendants, for the one seventh of the premises sued for, reversed, and the cause remanded for a new trial as to that portion of the premises.

Statement of Facts.

HENRY RICE, ADMINISTRATOR OF THE ESTATE OF JOHN KITTLEMAN, DECEASED, v. JAMES CUNNINGHAM *et als.*

NEW TRIAL WHEN EVIDENCE IS CONFLICTING.—The Supreme Court will not disturb the verdict if the evidence was conflicting, even though the Judge who passed on the motion for a new trial did not preside at the trial, and for that reason declined to review the evidence.

WHAT CONSTITUTES A CONFLICT IN EVIDENCE.—The Supreme Court always reviews the evidence, if the point is made that the verdict is contrary to the evidence, and if they find there is a substantial conflict in the same, so that the jury might find either way, without becoming obnoxious to the charge of passion, prejudice, misconception, or caprice, the verdict will not be disturbed.

RECORD OF AN ALCALDE'S GRANT AS EVIDENCE.—One who introduces and reads in evidence the record of a grant of a lot in the record book of original grants made by an Alcalde in San Francisco prior to the establishment of civil government in California, may also be required to exhibit to the jury whatever words are found in the margin of the record showing that the grant was not taken, and the cross lines on the same, if there are any.

INTRODUCTION OF EVIDENCE OUT OF ITS ORDER.—The bare fact that evidence is brought to the notice of the jury out of its regular order, is no ground for a new trial, if the evidence would have been competent in any stage of the trial.

EVIDENCE ON ALCALDE'S GRANTS.—If the party to an action relies upon the record of a grant in the record book of Alcaldes' original grants to prove his title to a lot in San Francisco, and claims that entries on the margin of the record, and cross lines of cancellation on the same, were placed there after the grant was made, to defraud him, it may be shown that the municipal fees for the grant were never paid, and that the grant was never delivered; also, the circumstances under which the grant was made, and by whom and under what circumstances it was cancelled on the record, may be shown.

STATEMENTS OF A DECEASED PERSON—EVIDENCE OF.—The statements of one who claims a lot of land, made to a stranger, after it has been taken possession of by one who claims adversely to him, are not admissible in evidence in favor of his heirs in an action brought by them to recover possession of the same.

RIGHT TO GIVE EVIDENCE OF FORMER STATEMENTS MADE BY A WITNESS.—The former statements of one who is a witness on a trial, cannot be given in evidence by the opposite party, except for the purpose of impeachment, and then not unless the witness was questioned as to such former statements made by him.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

This action was brought to recover possession of a fifty vara lot on the northeast corner of Bush and Montgomery streets, in the City of San Francisco.

Statement of Facts.

The plaintiff claimed that the intestate, John Kittleman, owned the lot under an Alcalde's grant issued to him by George Hyde, Alcalde of San Francisco in 1846. He asserted that the original grant delivered to Kittleman had been lost, and to prove its issuance, introduced in evidence the book of original grants of Alcaldes in San Francisco. On pages two hundred and thirty-seven and two hundred and thirty-eight of this book, were a form of petition of Kittleman for a grant of the lot, dated December 26th, 1848, with Kittleman's name appended, with a space left for a cross, and the words, "his mark," in the form usually adopted when the party cannot write, and signs by making his mark, but there was no cross or mark — and a grant, signed by the Alcalde. Cross lines, apparently cancelling the record, had been drawn over both the petition and grant, and on the margin, opposite each, were the words "not taken." The Court below required the plaintiffs to read to the jury as a part of the record, the said words in the margin, and also to exhibit to them the cross lines.

The defendants called as a witness George Hyde, the Alcalde who made the entries on the Alcalde's books, for the purpose of proving how the entries came to be made.

He testified that from December 15th, 1846, to January 20th, 1847, he was Alcalde *ad interim*, during the absence of Mr. Bartlett, the regular Alcalde, and that being desirous of securing for himself the lot in dispute, he requested John Kittleman to take out a grant for him. That Kittleman consented, and he then drew out a petition and signed Kittleman's name to it, leaving a blank space for his mark, as Kittleman could not write, and also drew out a grant to Kittleman of the lot without signing it, and placed both in the drawer of his table, and told his clerk not to record them. That, soon after, he concluded not to take the lot, and asked Kittleman to take it, but he refused, and about this time he discovered that his clerk had recorded both the petition and grant.

The witness was then asked what had been said and done between himself and Bartlett, after Bartlett's return, in relation to this grant and petition, and the record of them on the Alcalde's books.

The defendants objected to the question, and the Court overruled the objection.

The witness then testified that Bartlett and himself talked the matter over, and that he destroyed the original petition and grant, and Bartlett wrote the words "not taken" on the margin of the record, and drew the cross lines over the same.

The defendants called as witnesses Thomas Kittleman and Sarah Jones, two of the children of the intestate.

Plaintiff called witnesses for the purpose of proving that the two had, at a former time, made statements in conflict with their testimony. The Court excluded the testimony because the witnesses had not been interrogated on the subject.

The defendants recovered judgment in the Court below, and the plaintiff appealed.

James C. Carey, and Edward Tompkins, for Appellant.

S. M. Wilson, and Delos Lake, for Respondents.

By the Court, SANDERSON, J.

We are first asked to grant a new trial in this case upon the broad ground that the verdict is contrary to the evidence. Counsel admit that the evidence is conflicting, and acknowledge the force of the uniform rule of this Court not to disturb the verdict in such cases; but they claim that this is an exceptional case, and therefore ought not to be subjected to the operation of that rule.

New trial because the verdict is against evidence.

The foundation upon which this claim is based is the fact that the motion for a new trial was not passed upon by the same Judge who presided at the trial, and that he declined to review the evidence for the reason that "he did not preside at the trial, and had not therefore seen the witnesses and had an opportunity to judge of their credibility from their appearance on the stand;" and it is argued with much force that

under these circumstances the appellant will be deprived of a substantial right, secured to him by the law of the land, unless this Court assumes to a certain extent *nisi prius* functions, and examines, as an original question, the sufficiency of the evidence in this case and applies to it the more liberal tests of a *nisi prius* Court.

That a party has the legal right to have the testimony in his case reviewed by the Court below, under the rules of law applicable to such a proceeding, for the purpose of determining whether the verdict ought to be allowed to stand, cannot be denied; but upon what principle can it be claimed that if the lower Court should fail to so review the testimony, the functions of this Court would thereby become enlarged? Certainly in such a case the reason upon which the rule of this Court is founded is not made less cogent or persuasive by reason of the supposed dereliction of the Court below. We decline to decide between conflicting evidence because we are cut off from the only means through which a decision can be intelligently reached in such cases. If the weight of evidence was to be determined solely by a count of the witnesses, and the greater weight accorded to the greater number, the reason upon which our rule is founded would be overcome, but we know of no other mode by which that result could be accomplished. If then the appellant has suffered any wrong in the respect named, we are unable to see how we can afford a remedy. From the very nature of the question we must solve it upon the same principles upon which like questions are solved in other cases; we can make no distinction in favor of the present case because it is impossible that a distinction can be made.

In this connection it is proper to remark that the expression, which has become very common, that this Court will not look into the evidence, if it is conflicting, for the purpose of determining whether the verdict ought to stand, is not very exact. On the contrary we always do look into the evidence whenever the point is made; but if, upon a careful examination, it appears that there is a substantial conflict, in view of which,

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as presented to us, the jury might find either way without becoming obnoxious to the charge of passion, prejudice, misconception or caprice, we do not disturb the verdict, although we might if sitting as a jury find a different verdict; and we do this because we are cut off from those important aids to the attainment of a correct conclusion which the jury and the Court below find in the appearance and general bearing of the witnesses. The rule in question is applied only where there is a real and substantial conflict upon material points, and has no application where the conflict is more apparent than real or does not relate to controlling issues.

To analyze the evidence in this case and discuss its relative credibility and weight would consume time and space without profit. After a careful examination of the evidence, in which we have been most materially aided by the exhaustive analysis of counsel upon both sides, we are fully satisfied that this is eminently a case where the verdict ought not to be disturbed upon the ground alleged. It is sufficient to say generally, that whether we look to the evidence bearing directly upon the question as to whether there ever was a grant made and delivered to Kittleman, or to more remote facts and circumstances brought into the case in support of the principal proposition, we alike find a real and substantial conflict extending over the entire field. Numbers, it is true, appear to be on the side of the plaintiff in that part of the field where the principal issue is contested, but the more perfect and satisfactory knowledge of the disputed facts, supported by cotemporaneous record evidence, constituting (not to drop the figure) the heavier artillery, seem to be with the other side; while in that part of the field where the minor and auxiliary issues are contested the forces of the plaintiff seem to be completely flanked by those of the defendants. Such being the case, we cannot say that the umpires mutually chosen by the contesting parties have awarded the victory to the wrong side.

We now proceed to notice such exceptions taken at the trial as counsel for appellant have not abandoned. There are

many exceptions contained in the record, but they are reducible into a few general propositions.

I. As to "Record Book A of Original Grants."

Alcaldes' book of original grants as evidence.

We think the ruling of the Court requiring the plaintiff to read the words "not taken," found in the margin of the record of the alleged Alcalde grant from Hyde to Kittleman, and to exhibit the cross lines of cancellation to the jury, if he used the book at all as evidence in the case, was right. The argument of counsel for the appellant in support of their exception is grounded upon a false assumption. They lower "Book A" to the level of a chance copy book, and strip it of all its character and dignity as a public record of the transactions of a Government official vested with the exercise of most important functions, and then seek to use it upon a question not then before the Court. If the former could be done, if "Book A of Original Grants" could be regarded as a mere chance copy book of some private individual who, for his amusement or private convenience, had copied therein the grant in question, the point made here might be sustained had a question as to the contents of the grant been pending before the Court. In such a case upon proof that the grant had been in fact made and afterwards lost, and upon further proof to the effect that the copy in the book was in fact a copy of such grant, the book might be received for the purpose of proving the contents of the grant. But that is far from being the case. Here the plaintiff, without attempting to show that a grant to Kittleman was ever in fact made, commences by proving that no such grant can be found after a diligent and thorough search in every place where such a grant, if it ever existed, would most likely be found (thereby showing, thus far at least, that in all probability no such grant was ever made), and then offers the book in question in evidence. For what purpose? It is answered, "for the purpose of proving the contents of our grant." The reply is obvious: You have not yet shown

that you ever had a grant, and until that has been done there can be no question about its contents. Hence, at this stage of the case, it was not receivable even in its assumed character for the purpose of proving the contents of a lost grant; on the contrary, it could have been received only in its real character of an official record as secondary evidence of the grant itself, showing that it had in fact been made, which was the real question in issue. Such being the case, there can be no doubt but that the ruling of the Court was correct. While "Book A" showed that a grant in form had been made out, it also showed that it had been cancelled and never delivered to the grantee. Before a witness is allowed to take the stand he is sworn to tell, not the truth merely, but the whole of it, and we know of no exception to this rule in favor of record or documentary evidence.

This is not, as counsel seem to argue, the case of an altered or mutilated record. The words "not taken" and the cross lines of cancellation are a part of the record itself, and not an alteration or mutilation of it. At least they must be presumed to be so until the contrary appears, for such was the usual and ordinary official mode of cancelling a grant which from any cause had never been "taken out" or delivered, and, therefore, notwithstanding its apparent validity, null and void.

Under the thirty-seventh section of the Act concerning conveyances a mortgage may be discharged by an entry to that effect in the margin of the record signed by the mortgagee, or his personal representative or assignee, as the case may be. Suppose suit is brought upon a lost mortgage, and the record from the Recorder's office, with the discharge in the margin, is offered as secondary evidence of the existence of the mortgage, would not the entire record have to go to the jury, including the discharge? Such discharge, in the regular and legal course of business in the Recorder's office, has become a part of the record and must remain so for all purposes. The presumption of law is, that the discharge has been regularly and honestly entered, and if fraud is alleged it cannot be presumed but must be shown. If so, the same rule, in view of

the testimony as to the custom and usage of Alcaldes in respect to the cancellation of grants, would be applicable to the present case.

But admitting, for the sake of argument, that the Court erred in the particular under consideration, it was not such an error as would justify us in reversing the judgment. In view of the testimony of Hyde and Bartlett, and perhaps others, as to the mode of transacting business adopted by them and other Alcaldes, and particularly the practice of entering grants in "Book A" and subsequently cancelling them in case the municipal fees were not paid or if from any cause the grant was "not taken out," it cannot be said but that the words "not taken" and the cross lines were competent evidence for the defendants upon the main question whether a grant had ever in fact been made. Such being the case, it follows that no improper evidence was allowed to go to the jury, and the bare circumstance that by the ruling of the Court evidence was brought to the notice of the jury out of its regular order is no ground for a new trial.

Evidence of an Alcalde explaining entries on his book.

II. The exceptions to the testimony of Hyde as to what was said and done by himself and Bartlett in relation to the cancellation of the record in "Book A" are based upon the ground that Kittleman was not present, and the further ground that the acts and sayings of Hyde and Bartlett subsequent to the delivery of the alleged grant to Kittleman could not operate to defeat his rights thereby acquired.

If we assume that a grant was actually made and delivered to Kittleman on the 28th of December, 1846, and that the title to Lot 254 vested in him on that day, and that the defendants were attempting by the evidence in question to show a subsequent divesture, we should undoubtedly be compelled to hold that these exceptions are well taken; but that would be assuming the very point in controversy to disprove which the evidence under consideration, in connection with other evidence already given by Hyde, was offered by the defendants.

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We must not forget that there was substantially but one question involved in this case, and that was as to whether Hyde had ever made and delivered to Kittleman a grant of Lot 254. For the purpose of proving the affirmative, the plaintiff, in connection with other testimony, relied upon the record in "Book A," but in the same breath claiming that the words "not taken" and the cross lines there found were a fraud upon him, having been put there subsequent to the time when, as he alleges, the grant was issued and the title under it vested in Kittleman. To meet this evidence and charge of fraud, the defendants first show by Hyde that no grant was ever made by him to Kittleman, and then proceed to explain the alleged fraud by showing how the record in "Book A" came to be made, and how subsequently it came to be cancelled, the whole being used for the sole purpose of proving that no grant was in fact made and no fraud perpetrated, and we are unable to perceive why it was not competent for them to do so.

The resolution of the Common Council of San Francisco of March 26th, 1850, authorizing the Alcalde to procure a book into which all grants in Book A should be transcribed and certified by the Alcalde, and "Book No. 1 of Certified Grants," made in pursuance thereof, in which book all grants in said "Book A," purporting to have been cancelled in a manner similar to that shown on the record in said Book A, of the grant in question were omitted, was admissible as tending to show that as early as the making of said Book No. 1 the said marks of cancellation must have existed. While this testimony did not amount to much, still we think it was admissible as corroborative of other testimony, to the effect that the cancellation was made prior to that date. Under the instructions of the Court, to the effect that if the title to the land ever vested in Kittleman under the alleged grant, it could not afterward be divested by a mere cancellation of the records of the Alcalde, the jury could not have misunderstood the effect which they were to give to Hyde's and Bartlett's testimony and that of "Book No. 1 of Certified Grants."

III. The statements of John Kittleman made to G. W.

Opinion of Sawyer, J., concurring.

Crane in 1850 or 1851, after the defendant Cunningham had entered upon the lot, as appears from the complaint, were properly excluded. We are unable to perceive upon what ground it can be claimed that Kittelman could at that period of time manufacture evidence for himself or his personal representative, the plaintiff in this case.

IV. The statements and acts of Thomas Kittelman and Mrs. Jones were also properly excluded. Had Thomas Kittelman and Mrs. Jones not been examined by the defendants, there could be no pretense that their acts or sayings could be admitted as evidence. Such being the case, they could only be used for the single purpose of impeachment. For that purpose the former acts and statements of a witness may be given in evidence, but the way must be prepared by a previous examination of the witness himself as to such acts and statements, which was not done in this case. (1 Greenleaf Evidence, Sec. 462.)

We do not think the charge of the Judge is obnoxious to the objections and criticisms of counsel.

Judgment affirmed.

SAWYER, J., concurring.

This cause was tried before me while Judge of the Twelfth Judicial District; and not by the District Judge who denied the new trial. When the motion for new trial came up for argument, the counsel for the plaintiff stated that he expected to obtain a new trial, on the ground that the verdict was against the evidence, at the same time admitting that the evidence upon which the verdict of the jury was rendered was conflicting, but claiming that the weight of evidence was in his favor. Thereupon the Judge intimated to counsel that inasmuch as he did not preside at the trial, and did not see the witnesses, or have any knowledge as to their appearance on the stand, he should not feel at liberty to disturb the verdict of the jury unless some error of law had been committed.

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Upon such intimation, "the counsel for the plaintiff deemed it best to submit the cause without argument, and the motion for a new trial was accordingly denied." Counsel seem to have acquiesced in this action of the Court, and do not appear to have insisted that the Judge should examine the testimony, or to have excepted to the course pursued. They cannot now, for the first time, insist that the action of the Judge in intimating that he would not weigh the conflicting evidence was error.

But the peculiar circumstances of the case are urged as reasons why this Court should not confine itself to the narrow limits recognized by its well established rule as to balancing conflicting testimony, especially since one of its Judges presided at the trial in the District Court, and, therefore, is possessed of those aids which were wanting to the Judge who denied a new trial.

In view of these suggestions I deem it proper, without attempting a discussion of the evidence, to briefly state the conclusion to which my mind is led. There had been one trial and counsel entered upon the final contest thoroughly prepared on every point. The interest manifested by counsel was worthy the magnitude of the stake, and the cause was tried on both sides with consummate ability. If the full strength of the case was not then presented there is little hope that it ever will be brought out. I listened to the entire evidence with unusual interest, and followed closely the elaborate and eloquent arguments of counsel before the jury, where the testimony was subjected to a masterly and thoroughly exhaustive analysis, and its weight, credibility and bearing were fully discussed. I have again, long since the excitement of the trial has passed away, read with care the entire evidence in the transcript, and the one hundred and sixty printed pages of briefs of counsel, in which the argument is again absolutely exhausted. When the verdict was rendered I was strongly impressed with the idea that it was justified by the evidence. And now, on a more careful review, after comparing and balancing the conflicting testimony, and

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applying to it, so far as I am able, all the known logical and legal tests, with a view of determining its credibility, and giving to each portion its due weight, I am still not only satisfied that the testimony is such that I should not, upon the most liberal view which could be taken, feel at liberty, if sitting as District Judge, to disturb the verdict, but also, if submitted to me upon the same evidence as an original question, I should feel compelled to find that the grant was never delivered to Kittleman—that the document made out never became a grant. The verdict, therefore, in my opinion, is fully sustained by the evidence.

Upon the questions of law raised by appellants, I also concur in the opinion delivered by Mr. Justice Sanderson.

RHODES, J., dissenting.

I dissent from the judgment on the ground that the instruction of the Court in respect to the presumption arising from the lines of cancellation drawn across the record, and the words “not taken” written upon the margin of it, is, in my opinion, erroneous.

CURREY, C. J., also dissenting.

I am of the opinion the judgment of the Court below should be reversed for the cause assigned by Mr. Justice Rhodes for his dissent from the judgment of affirmance.

JOHN W. BRUMMAGIM, ADMINISTRATOR OF THE ESTATE
OF ANDREW J. KING, DECEASED, v. D. J. TALLANT.

STATUTE OF LIMITATIONS ON CERTIFICATE OF DEPOSIT.—The Statute of Limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and no special demand is necessary to put it in motion.

CERTIFICATE OF DEPOSIT.—In substance and legal effect a certificate of deposit and promissory note are the same.

Argument for Appellant.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

A. J. King, on the 8th day of December, 1860, deposited with Tallant & Wilde, bankers, two thousand dollars, and received certificates of deposit therefor payable to his order on demand. The certificates were shortly after stolen from King, and Tallant & Wilde, December 27th, 1860, paid King the money. At the same time, King, to indemnify them, delivered to them three thousand dollars in six per cent bonds of the City and County of San Francisco. Tallant & Wilde at the same time gave King a written agreement that they were to keep the bonds until the certificates were found and delivered up to them to be cancelled, or were barred by the Statute of Limitations. Plaintiff, who was administrator on the estate of King, on the 2d day of February, 1865, demanded the bonds of defendant, who was the surviving partner of the firm. The defendant refused to deliver them, and this suit was instituted July 19th, 1865, for their recovery. The defendant demurred to the complaint. The demurrer was overruled. The defendant declined to answer, and judgment was rendered for plaintiff. The defendant appealed from the judgment.

Collins & Clemments, for Appellant.

The Statute of Limitations does not begin to run in any case until a right of action has arisen. (*Downes v. Phoenix Bank*, 6 Hill, 297; Story on Bailments, 66, Sec. 88; *Marzetti v. Williams*, 1 Barn. & Ald. 415; Chitty on Bills, 547, Ed. of 1839; *Barr v. Walker*, etc., 12 Barb. 301; *Lillie v. Hoyt*, 5 Hill, 400.) And we contend that a cause of action does not appear by the complaint to have arisen on these certificates for want of a request to pay, or its equivalent. Until a neglect or refusal to pay, there can be no breach, and there can be no right of action *ex contractu* until after a breach. (*Patterson v. Poindexter*, 6 Watts & S. 227; *Little v. Blunt*, 9 Pick. 491; *Piquet v. Curtiss*, 1 Sumner, 480.)

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Clark & Carpentier, for Respondent.

By the Court, SANDERSON, J.

The only question which we deem it necessary to notice in this case relates to the time when the Statute of Limitations begins to run against an instrument in use among bankers, called a certificate of deposit. On the part of appellant it is claimed that a demand and refusal to pay is necessary in order to put the statute in motion, for the reason, as alleged, that until there has been a demand and refusal, there is no breach of the contract on the part of the banker, and consequently, until then, no right of action has accrued to the depositor.

It was held substantially in *Welton v. Adams & Company*, 4 Cal. 37, that a banker's certificate contained all the essential and distinctive elements of a promissory note. Mr. Justice Heydenfeldt, delivering the opinion of the Court, said: "The common use of this kind of security is of recent origin, and they have, therefore, not been made the subject of judicial decision, as far as I can discover. An examination into their specific character shows that, although differing in form from a promissory note, yet they have all its important incidents. Each contains a promise by one person to pay another person absolutely and unconditionally a certain sum of money, at a time specified therein. The rules of law, in reference to all securities, ought to be applied according to the nature of the security, and not to be influenced by the name by which the paper is commonly known. I have, therefore, no longer any doubt that these certificates of deposit must be, so far as negotiability is concerned, placed upon the same footing as promissory notes."

Miller v. Austin et al., 13 How. U. S. 218, was an action by an indorsee against an indorser of a banker's certificate of deposit, after demand and protest, as in case of a promissory note. The action was brought in Ohio, where, as in this State, it is provided by statute that all promissory notes drawn

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for a sum certain, payable to any person or order, or to any person or his assigns, shall be negotiable by indorsement. Mr. Justice Catron, delivering the opinion of the Court, said: "The established doctrine is, that a promise to deliver, or to be accountable for, so much money, is a good bill or note. Here the sum is certain and the promise direct. Every reason exists why the indorser of this paper should be held responsible for his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note, the State Courts generally have treated certificates of deposit payable to order; and the principles adopted by the State Courts in coming to this conclusion are fully sustained by the writers of treatises on bills and notes."

In *The Bank of Peru v. Farnsworth*, 18 Ill. 563, and *Laughlin v. Marshall*, 19 Ill. 390, the Supreme Court of Illinois directly decided that the instruments under consideration were in fact and in law promissory notes for the payment of money.

To substantially the same effect are the following cases: *Carey v. McDougald*, 7 Ga. 84; *Kilgore v. Bulkley*, 14 Conn. 362; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Johnson v. Barney & Co.*, 1 Iowa, 531.

Citing some of the foregoing cases, Mr. Parsons, in his work on notes and bills (Vol. 1, p. 26), says: "We think this instrument possesses all the requisites of a negotiable promissory note, and that seems to be the prevailing opinion."

With the foregoing views we fully concur. The differences between a certificate of deposit and a promissory note are merely formal. In substance and legal effect the two instruments are the same; and the former, notwithstanding its name and the phraseology in which the consideration is expressed, must be regarded and treated as a promissory note payable on demand.

Such being the character of the instrument, the question as to when the Statute of Limitations begins to run is not debatable. It has been held invariably that the statute commences to run against a promissory note payable on demand from the date of the note, and that no special demand is necessary to put it

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in motion; which follows, from the rule, that no demand before suit is required in order to give a right of action upon a demand note. (Angell on Limitations, Chap. XI.) This latter rule is illogical and undoubtedly obnoxious to the criticism of Mr. Chief Justice Bronson in *Downes v. The Phoenix Bank of Charleston*, 6 Hill, 299, where he said: "We are reminded that when the promise is to pay on demand, the bringing of the action is a sufficient demand? If that were a new question, I think the Courts would not again fall into the absurdity of admitting that there must be a demand, and still holding that a suit may be commenced without any prior request. They would either say that no demand was necessary, or else that it was a condition precedent to the right of action. It is an anomaly in the law that the breach of the defendants' contract should be made out by the very fact of suing him upon it." But such is the rule, and the power to change it has long since passed from the Courts. If a change is demanded it must be sought elsewhere.

Judgment affirmed.

CARL JAHNS v. HENRY W. NOLTING.

RIGHT TO POSSESSION OF PERSONAL ESTATE OF DECEASED.—Under the Statute of Descents and Distributions in this State, the title to the personal estate of the deceased vests in the heir, but the administrator is entitled to the possession of the same, and this right of possession extends by relation back to the time of the death of the deceased.

ACTION FOR WRONGFUL TAKING OF PERSONAL ESTATE OF DECEASED.—The administrator may maintain an action for the wrongful conversion of the personal estate of the deceased, intermediate the death and issuance of letters.

SAME.—Such action may be maintained against one who has embezzled or alienated the personal estate of the deceased, without the aid of section one hundred and sixteen of the Probate Act; and said section does not give a new right of action, but merely increases the damages.

SAME, WHERE COMPLAINT ALLEGES EMBEZZLEMENT.—If the complaint in such action alleges that the defendant embezzled, alienated, and converted to his own use the personal estate of the deceased, and prays for double damages, the plaintiff is entitled to recover double damages, if the proofs sustain the allegation; but if the proofs of such conversion fail to show that it took place intermediate the death and the grant of letters, the plaintiff's recovery should be as in an ordinary action of trover.

Argument for Appellant.

SECTION ONE HUNDRED AND SIXTEEN OF PROBATE ACT.—Section one hundred and sixteen of the Probate Act does not afford the exclusive remedy for embezzling and alienating the personal estate of the deceased, intermediate the death and grant of letters.

SAME.—Section one hundred and sixteen of the Probate Act is not a penal, but a remedial statute.

RIGHT OF WIDOW TO GIVE AWAY PERSONAL PROPERTY OF DECEASED.—A gift by the widow of the deceased of personal property of deceased, intermediate the death and issuance of letters of administration, does not confer upon the donee either title to or right to the possession of such property as against the administrator.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

James B. Townsend, for Appellant.

It was the rule, under the old system of pleading, and is, with still greater reason, the rule under the system introduced by the modern Practice Acts, that, in actions founded on tort, the averments are divisible, and that, in order to recover, it is not necessary to prove the whole of such averments, but only so much or so many of them as will establish the plaintiff's right therein to some relief. (1 Chit. Pl. 386, 387, 392, 393; 1 Phil. Ev. 836, 837; 1 Stark. Ev. 432, 433, 442; *Jones v. Givin*, Gilb. Cas. 229; *Weed v. S. S. Railroad Co.* 19 Wend, 540.)

In such cases, although the complaint or indictment might allege such facts, yet, if the proof failed to establish them on the trial, judgment would, nevertheless, be given for the common law measure of relief, or of punishment. (1 Comyn's Dig., *Action upon Statute*, (C); *Pallant v. Roll*, W. Black. 900; *Farmers' Turnpike v. Coventry*, 10 Johns. 389-393; *Scidmore v. Smith*, 13 Johns. 322; 1 Chit. Crim. Law, 637-638; 2 Hale's Pls. Cr. 302; Hawk. Pls. Cr. Bk. 2 Ch. 25, Sec. 115; *Harwood's Case*, Style's Rep. 86.)

The gift of the property by the widow constituted no defense. (*Piercy v. Sabin*, 10 Cal. 27; *Green v. Palmer*, 15 Cal. 415; Act to regulate the settlement of the estates of deceased persons, Secs. 114, 115, 154, 195.)

P. G. Buchan, for Respondent.

The action is a penal action, brought under section one hundred and sixteen of the Probate Act. It contains two counts: one for embezzling certain articles of personal property, and the other for collecting and embezzling certain rents, and demands judgment for double the value of the property and money, "according to the statute in such case made and provided."

Like all penal statutes, it must be strictly construed, and the case must be clearly made out. (*Beckman v. McKay*, 14 Cal. 152.)

If plaintiff failed to make out his penal action, he cannot change the two counts into trover and assumpsit, and ask to recover in such forms of action.

There might be an illegal taking or conversion, for which an ordinary action might be sustained, but not a penal action for embezzlement.

By the Court, RHODES, J.

The plaintiff, the administrator with the will annexed of Herman Schroeder, deceased, alleges in the complaint that after the death of Schroeder, and prior to the granting of the letters of administration, the defendant "took, carried away, embezzled, alienated and has converted to his own use certain goods, chattels and effects which were of the estate of the deceased; also, that the defendant during said time collected and embezzled certain moneys and rents belonging to said estate, and wrongfully and unlawfully intermeddled with said estate and ordered the tenants to pay the rents to no one but himself, and thereby caused a certain sum to be lost to said estate," and he prays for judgment for double the value of the property embezzled, and the money caused to be lost.

The Court found as facts: "That the defendant did not embezzle or alienate and convert to his own use, *contrary to the statute in such case made and provided*, all or any of the

goods, chattels, effects, moneys, rents, or other property which were of the said Herman Schroeder, deceased, in his lifetime, as in the complaint of the plaintiff set forth, nor did he unlawfully interfere and intermeddle with said estate, and order the tenants of the real estate to pay the rents thereof accrued, and which should afterwards accrue, to none but himself, and did not thereby cause to be lost to said estate one hundred and forty-four dollars, or any other sum, as in said complaint alleged."

The plaintiff filed his exceptions to the finding, on the ground, among others, that the Court did not find whether, during the period mentioned and prior to the bringing of the action, the defendant took, carried away and converted to his own use, the goods and chattels mentioned, but the Court failed to remedy the alleged defect.

In denying the plaintiff's motion for a new trial, the Court was of the opinion that the action was for embezzlement, and was brought under section one hundred and sixteen of the Probate Act, which alone gave the plaintiff a remedy for the alleged wrong, and that under the allegations of the complaint, the plaintiff was not entitled to recover for the wrongful conversion, as in the action of trover at common law—that he must prove the embezzlement or fail in the action. The counsel for the defendant holds to the same views, and offers as a further reason why the plaintiff could not recover, as in trover, upon the complaint in the cause, that the action given by section one hundred and sixteen is a penal action.

Right of administrator to personal property of estate.

It is well settled that under our probate system, the administrator is entitled to the possession of the personal estate of the deceased until disposed of in the course of administration. (*Beckett v. Selover*, 7 Cal. 238; *Meeks v. Hahn*, 20 Cal. 627.) At common law the title vested in him, but under the Statute of Descents and Distributions of this State, the title vests in the heir. At common law the title vested in the administrator, by relation, at the time of the death of the deceased; and,

under the system in force here, the administrator's control of the property, by relation, extends back to the same point of time, and he is deemed in law from that time to have the possession, or to be entitled to the possession of the personal property, as the case may require. The administrator, may, therefore, institute an action in the nature of the action of trover, in his own name—his special property being sufficient for that purpose—against a person who, after the death of the deceased, and before the issuing of the letters of administration, converts to his own use the personal property of the estate of the deceased. His right of action in such case is the same as in case of a conversion after his appointment as administrator.

Embezzlement of property of estate.

To embezzle, as the term is employed in section one hundred and sixteen, is to fraudulently appropriate to one's own use, or conceal the effects of the estate which such person has in his possession; and to alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. An action of the nature of an action of trover may be brought by the administrator, without the aid of section one hundred and sixteen, against any person who has embezzled or alienated the personal property of the estate, prior to the grant of administration; and that section does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss—that is, the time intermediate the death of the deceased and the issuing of the letters of administration.

Action by administrator for embezzlement of personal property of estate.

The position that section one hundred and sixteen affords the exclusive remedy for embezzling and alienating the effects

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of the deceased, intermediate the death of the deceased and the grant of administration, cannot be maintained, unless that section can be held to be a penal statute; and it is not improper to add that, if it should so be held, it would not necessarily follow that the remedy was exclusive; for the right of action existing for the conversion, independently of that section, it might well be, that the remedy was cumulative. The distinctions between penal and remedial statutes, are not always clearly marked, nor are the authorities quite harmonious, where statutes very similar in their purpose and general terms have been under review. A penal statute is one that imposes a penalty, or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong, that concerns the good of the public, and is commanded or prohibited by law. The law, generally, first prescribes what shall or shall not be done, and then declares the penalty. Its primary object is punishment, and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action. (*Reed v. Northfield*, 13 Pick. 94; *the Suffolk Bank v. the Worcester Bank*, 5 Pick. 106; *Frohock v. Pattee*, 38 Maine, 103; *Bayard v. Smith*, 17 Wend. 88; Sedg. Stat. and Const. Law, 390.)

In this case, the public are not more interested than they are in every action for a tort prosecuted for the benefit of a private party, nor do the damages authorized by the statute partake of the nature of the punishment for an offense, in a greater degree than in every case where by the common law or the statute a recovery beyond the actual injury sustained is permitted. In *Reed v. Northfield*, *supra*, which was brought for an injury caused by a defect in the highway—the statute giving double damages—Mr. Chief Justice Shaw said that all damages for neglect or breach of duty operated to a certain extent as punishment, and that though the law gave the person injured enhanced damages, they were recoverable to his own use and as indemnity for the injury sustained. In *Beckman v. McKay*, 14 Cal. 250, the Court considered the action,

which was brought under section one hundred and sixteen of the Probate Act, as in the nature of an action of trover and conversion.

The statutes of this, as well as those of other States, present many instances, in which no new rights of action or remedies for private injuries are created, but the damages authorized to be recovered are, by those statutes enhanced. Such is the case in respect to sections two hundred and fifty and two hundred and fifty-one of the Practice Act, which provide respectively, that in certain actions for waste, and actions for cutting down and injuring timber, etc., the plaintiffs shall be entitled to treble damages; but those statutes, like the one under consideration, are not penal, but are remedial.

The action being substantially the action of trover, where the plaintiff has averred the facts entitling him to recover damages according to the measure as enhanced by the statute and has claimed the same in his prayer for relief, they should be awarded to him accordingly, if the evidence sustains the allegations of the complaint; and if he fails to prove the allegations which bring the case within the statutory rule of damages, but sustains the issues upon the remaining allegations, the recovery should be as in ordinary actions for trover and conversion. The Court below should therefore find upon the other issues in the case, although the finding may have been against the plaintiff, as to the alleged time of the conversion of the property — the time between the death of the deceased and the grant of letters of administration.

The defendant introduced evidence showing a gift of portions of the property in controversy, by the widow of the deceased to the defendant and the brothers of the deceased. The widow is authorized by section one hundred and twenty of the Probate Act "to remain in possession of the homestead and of all the wearing apparel of the family, and of all the household furniture of the deceased," until letters have been granted and the inventory returned; and the statute confers upon her no other or further right in or control over

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the personal estate, until it is set over to her by the executor or administrator, by order of the Probate Court or according to the provisions of the will. The alleged gift was made before the grant of the letters of administration, and of course the property could not at that time have been delivered to her by the administrator, and it is impossible to see how a gift of the property by her, at that time, could confer upon the defendant either title or right to the possession of the property, as against the administrator. Sections one hundred and fourteen and one hundred and ninety-four of the Probate Act authorize and require the executor or administrator to take into his possession all the estate of the deceased, and his right in this respect cannot be defeated by any attempted transfer by the heir or the legatee.

Judgment reversed, and the cause remanded for a new trial.

JOSEPH GARWOOD v. HENRIETTA M. GARWOOD.

WHO MAY CONTEST ACCOUNT OF ADMINISTRATOR.—The right to appear in a Probate Court and contest the account of an administrator is restricted to persons who are interested in the estate.

INTEREST OF PERSON ASKING TO CONTEST ADMINISTRATOR'S ACCOUNT.—If there is a reasonable doubt as to whether a person who applies to be allowed to contest the account of an administrator has any interest in the estate, that doubt should be resolved in favor of the applicant.

SAME.—However remote or contingent the interest of a person may be, who asks to be allowed to contest an administrator's account, his right to contest should not be denied.

EVIDENCE AS TO INTEREST OF ONE CONTESTING ADMINISTRATOR'S ACCOUNT.—The Probate Court is not bound by the statement in the petition of an applicant to contest an administrator's account, that he has an interest in the estate, but may take testimony as to whether he has any interest.

PAROL TESTIMONY TO IDENTIFY PERSONS NAMED IN A RECORD.—When a record of a former judgment is admitted in evidence, parol testimony is also admissible to show the identity of the parties named in the record with those named in the pending action.

IDENTITY OF NAMES SHOWS IDENTITY OF PERSONS.—When a former judgment is received in evidence, the identity of the names in the judgment with those in the pending action is *prima facie* sufficient to establish the identity of persons.

JUDGMENT OF PROBATE COURT ON ISSUANCE OF LETTERS OF ADMINISTRATION.—Where the husband dies without living issue, and leaves his wife pregnant, and she is afterwards delivered of a child, and then applies for

Argument for Respondent.

letters of administration upon the estate of the child, and the father of the deceased contests the issuance of letters on the ground that the child was not born alive, and the issue is tried, and the Probate Court finds that the child was born alive, and grants the letters, the judgment of the Probate Court is evidence upon the question as to whether the child was still-born, in a subsequent application of the father of deceased to contest the account of the administrator, and is conclusive upon that question.

DOCTRINE OF *res adjudicata* APPLIES TO PROBATE COURTS.—The doctrine of *res adjudicata* applies to judgments and decrees of the Probate Court as well as to those of any other judicial tribunal.

RULE AS TO CONCLUSIVENESS OF JUDGMENTS.—The rule that a judgment of a Court having jurisdiction directly upon the point in controversy is as a plea, a bar, and as evidence conclusive between the same parties and their privies, is restricted to facts directly in issue, and does not embrace facts which may be in controversy but rest in evidence.

APPEAL from the Probate Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Sloan & Provines, for Appellant.

The record of the proceedings in the matter of the estate of Joseph M. Garwood, deceased, was not conclusive in this case that Joseph M. Garwood was born alive; nor that, if born alive, he was the son of Joseph S. Garwood. (*Blackham's Case*, 1 Salkeld, 290; *Hibshman v. Dulleban*, 4 Watts, 190–192; *Duchess of Kingston's Case*, 2 S. Lead. Cas. 424–433.)

W. & C. Bartlett, for Respondent.

The Court did not err in hearing evidence as to the interest of the applicant in the estate of Joseph S. Garwood, deceased. (Dayton on Surrogate, 3 Ed. 488; *Gratacap v. Phyfe*, 1 Barb. Ch. 485; 1 Brad. Sur. Rep. 29; 1 Starkie on Ev. 188; 1 Green. on Ev., Sec. 538; 2 Smith's Leading Cases, 439; 4 Phil. on Ev., C. & H.'s Notes, Part II, Note 26.)

Parol proof was admissible to connect the record with the present proceedings. (*Campbell v. Bates*, 3 Com. 173; *Young v. Runnell*, 2 Hill, 478; *Coit v. Zeigler*, 16 Sargt. & Rawle, 282–285; *Cortzer v. Russell*, 16 Ib. 81; 4 Phil. on Ev., C. & H.'s Notes, 14, 22, and 84.)

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The record in the matter of the estate of Joseph M. Garwood, deceased, is conclusive proof in these proceedings of the fact that said Joseph M. Garwood was born alive. (*Estate of Emma Hughes*, 1 Brad. Sur. Repts. 103; *Parker v. Standish*, 3 Pick. 288; *Young v. Black*, 7 Cranch, 565; *Miller v. Maricee*, 6 Hill, 114; *Eastman v. Cooper*, 15 Pick. 276; *Gardner v. Buckbee*, 3 Cowen, 120; *Perkins v. Walker*, 19 Vt. 144; *Hayes v. Gudykunst*, 1 Jones, 221; *Laurence v. Vernon*, 3 Sumner, 20; *White v. Coatsworth*, 2 Selden, 137; 2 Smith's Leading Cases, H. & W.'s Notes, 5th Am. Ed. 674; 4 Phil. on Ev., C. & H.'s Notes, Note 12.)

By the Court, SANDERSON, J.

This is an appeal from an order of the Probate Court of the City and County of San Francisco, denying to Joseph Garwood the right to appear and contest the settlement of the first annual account of Henrietta M. Garwood as administratrix of the estate of her husband, Joseph S. Garwood, deceased.

The facts of the case are substantially as follows:

On the 22d of February, 1863, Joseph S. Garwood died intestate, seized and possessed of real and personal property in this State of considerable value, leaving him surviving his wife, Henrietta M. Garwood, the respondent in this case, but leaving no issue then born.

On the 10th of March, 1863, letters of administration upon the estate of the said intestate were issued by the Probate Court of the City and County of San Francisco to the said Henrietta M. Garwood.

At the time of her husband's death Henrietta M. Garwood was pregnant, and afterwards (on the 18th of March, 1863) gave birth to a male child, called in this case Joseph M. Garwood. This child, if born alive, died immediately, or soon after his birth. Assuming that the child was born alive, and that he died seized and possessed of real and personal property, his mother applied to the Probate Court for letters of

administration upon his estate. Her application was by petition in the usual form, and was contested by Joseph Garwood, the appellant in this case, who alleged that he was the father of Joseph S. Garwood, deceased, and that the said Joseph S. Garwood died without issue, leaving him surviving his widow, the said Henrietta M. Garwood, and that there never was in being any such person as Joseph M. Garwood, as alleged in the application of letters of administration, and therein claimed to be the son of the said Henrietta M. Garwood.

Upon the issue thus formed, as to whether Joseph M. Garwood was alive when born, a trial was had in the Probate Court and witnesses were called and examined, both parties appearing by counsel, and thereafter, on the 23d of September, 1863, all parties being present, in person or by counsel, the Court filed its finding of facts and conclusions of law, to the effect, among other things, that the child Joseph M. Garwood was born alive and died seized and possessed of real and personal estate, and that the respondent, Henrietta M. Garwood, was entitled to the administration of said estate; and it was ordered that the appellant's objections to her appointment as administratrix be held for naught and that letters of administration be issued to her, which was accordingly done. All of which appears of record. No appeal was taken and the time for such a step had passed prior to the institution of the proceedings at bar.

Subsequently, on the 5th day of September, 1864, Henrietta M. Garwood filed her first annual account as administratrix of her deceased husband, Joseph M. Garwood, and a day was appointed for its examination and settlement; at which time the appellant, Joseph Garwood, appeared, and by petition in writing, asked to be allowed to contest the account, alleging among other things that he was interested in the estate of the said Joseph S. Garwood, deceased; that he was the father and heir-at-law of the said Joseph S. Garwood; that the said Joseph S. Garwood died without issue except that a posthumous child was born to him but was not born

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alive. So, whether he was so interested in the estate of Joseph S. Garwood, so far as there was any controversy, depended entirely upon the question of fact as to whether Joseph M. Garwood was born dead or alive.

This application of Joseph Garwood to be allowed to appear and file exceptions to and contest the account of the said Henrietta M. Garwood, was resisted by her, who pleaded, in bar of his alleged right, the finding and judgment of the Court in the matter of her application for letters of administration upon the estate of her son, Joseph M. Garwood, above referred to, specially alleging that the fact as to whether Joseph M. Garwood was born alive, was directly in issue and litigated between the present parties in that proceeding. Upon the issues thus formed a trial was had. Upon the question as to whether Joseph M. Garwood was born alive, the respondent offered in evidence the record in her application for letters of administration upon his estate, and claimed that the same was conclusive upon that question. This evidence was objected to by the appellant, but was admitted by the Court and held to be conclusive of the question as to whether the child was born alive, but as having no further effect. The respondent then offered evidence of her marriage with the intestate and that the said child was the lawful issue of that marriage, (which last fact was admitted by the appellant,) and also evidence of the identity of the parties concerned, which was also excepted to by the other side. No evidence was introduced by the appellant. The Court found that the appellant had no interest in the estate of Joseph S. Garwood; and so his petition was denied and hence this appeal.

Contesting account of an administrator.

It is first claimed that the Court below erred in allowing the right of the appellant to appear and contest the correctness, legal or actual, of the account, to be questioned at all by the administratrix, because, as it is alleged, the sworn petition of the appellant was of itself sufficient to establish his right to do so without further inquiry.

In support of this proposition counsel who have charge of the appellant's case have failed to produce any authority; and when we remember that they are distinguished for their industry and never fail to fortify their points by authority whenever, by the most patient research, such authority can be found, we may well doubt if adjudged cases exist by which the position in question can be sustained. But be that as it may, we are satisfied that the point in question is without merit on the score of principle. The language of the two hundred and thirty-fourth section of the Probate Act is, "that any person interested in the estate may appear and file exceptions in writing to the account and contest the same," not that any person that way inclined may do so.

It is the duty of the Court to carefully scrutinize the accounts of executors and administrators and correct all errors founded in law or fact; and it is the right of all the creditors and distributees of the estate to be present and, if so disposed, contest the same; but the right so to do is expressly restricted to them. There is in this respect no distinction between this and like cases and other suits or legal proceedings. The rule is universal in all legal proceedings that parties not interested have no concern in them and cannot be allowed to intermeddle. If, then, a party seeks to interpose and participate in or originate a judicial controversy, and his right to interfere is denied, the first duty cast upon the Court is to determine whether such person has any interest whatever in the subject matter pending before it, and if it turns out he has none, he must be declared an intruder and excluded from any further participation.

Suppose the administratrix in this case had denied the right of the appellant to intermeddle, upon the ground that he was not the person whom he represented himself to be, but was an impostor, falsely representing himself to be the father and heir-at-law of the intestate — could there have been any doubt as to the power and duty of the Court in the premises? We think not. A contrary rule might lead to gross abuses, without any corresponding advantages, and would entirely subvert

all our notions of the orderly conduct of judicial investigations. Such investigations are sufficiently guarded when confined to the inspection and participation of those who are actually interested in the result.

Doubtless, in a case like the present, which is to a certain extent a preliminary proceeding, the question rests very much in the discretion of the Court, and any doubt as to the question of interest ought to be resolved in favor of the petitioner; and however remote or contingent his interest may be, or, in other words, if he has the appearance of an interest, his right to contest ought not to be denied. (Dayton on Surrogates, 452.) But the Court undoubtedly has the power to determine the question of interest, if controverted, and is not bound to accept as conclusive the *ex parte* statement of the party claiming the right to contest. The Court may therefore not only take testimony for the purpose of determining the question, but in our judgment is bound to do so. Whatever discretion the Court may have in the premises ought not to be exercised until after the evidence is in. If then it be doubtful whether the party is interested, the Court should allow him to appear, but not otherwise.

Judgment of Probate Court on appointment of administrator as evidence, and as a bar on the issues there tried.

But the more important question involved in the case relates to the admissibility of the record in the matter of the estate of Joseph M. Garwood, for the purpose of proving that he was born alive.

So far as the admissibility of the parol evidence offered in connection with the record for the purpose of establishing the identity of the parties named in that record with those named in the record in the case pending before the Court, there can be no doubt, although in our judgment such evidence was not needed, for the identity of the names was *prima facie* sufficient to establish the identity of the persons. (*Carleton v. Townsend*, 28 Cal. 219; *People v. Thompson*, 28 Cal. 214.) The effect of the evidence was not, as suggested by counsel, to add

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to the record, but merely to show its connection with the pending controversy by establishing the identity of the parties and the subject matter. In that respect, whatever the record fails to demonstrate may be shown by evidence *aliunde*. (*Gray v. Dougherty*, 25 Cal. 272.)

We are of the opinion that the finding and judgment of the Court in the matter of the application of the respondent for letters of administration upon the estate of her son Joseph M. Garwood were competent evidence upon the question as to whether he was still-born, and that the same, never having been reversed, were conclusive upon that question, upon the well established principle that matters which have been once judicially determined cannot be again drawn into controversy between the same parties.

The judgment of a Court having jurisdiction directly upon the point in controversy is, as a plea, a bar; and as evidence, competent and conclusive as between the same parties and their privies; not only where the subject matter is in all respects the same, but where the point comes incidentally in question in relation to a different matter. (*Gray v. Dougherty*, 25 Cal. 272; *Caperton v. Schmidt*, 26 Cal. 493.) This rule, however, is restricted to facts directly in issue, and does not embrace facts which may be in controversy, but rest in evidence and are merely collateral. A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue; and notwithstanding they may be controverted at the trial, they do not come within the rule. (*King v. Chase*, 15 N. Hamp. 16.)

This doctrine of *res adjudicata* applies to the judgment and decrees of the Probate Court as well as to those of any other judicial tribunal. (2 Smith's Leading Cases, 522, *et sequens*; *Blackhom's Case*, 1 Salkeld, 290.)

That the fact whether Joseph M. Garwood was born alive or not was directly put in issue, tried and found in the matter

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of the application for letters of administration upon his estate, does not admit of debate. It is apparent upon the face of the record, without the aid of evidence *aliunde*. It was not only expressly put in issue by the petition and remonstrance, but it was necessarily the controlling issue in the case. Moreover, it was the only issue about which there was any controversy, and lay at the foundation of the jurisdiction of the Court, which has jurisdiction over the estates only of such persons as are dead, and it cannot be said that a person has died who was never in *esse*. It was, therefore, not only a fact in issue, but the principal fact upon which the result of the proceedings then before the Court depended. It was not only a question which the Court had jurisdiction to try, but it was a question which the Court *ex necessitate rei* was compelled to determine before a judgment could be pronounced. It being so, and the parties being the same in both proceedings, we have a case clearly within the rule under consideration.

This case is readily distinguishable from Blackham's Case, 1 Salkeld, 290, cited by counsel for appellant. That was *trover*. The plaintiff proved the goods to have been in his possession, and to have been taken away by the defendant. The defendant proved the goods to have belonged to one Jane Blackham in her lifetime, and that he had taken out letters of administration on her estate, and so was entitled to the possession of the goods. Thereupon the plaintiff proved that some few days before her death Jane Blackham was actually married to him. The foregoing is a full statement of the case as reported. So, whether the fact of the plaintiff's marriage with Jane Blackham was put in issue, tried and determined in the Spiritual Court on the application of the defendant for letters of administration, did not appear. The defendant, however, insisted that the grant of letters to him was conclusive that no such marriage had in fact taken place, because the Spiritual Court could not have granted letters to him except upon the supposition that there was no such marriage. But Holt, C. J., said: "A matter which has been directly determined by their (the Spiritual Court) sentence cannot be

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gainsaid. Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence, as in this case, because the administration is granted to the defendant; therefore, they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been "married or unmarried," and their sentence had not been "married." From which language we understand Lord Holt's meaning to have been that if the fact of the plaintiff's marriage with the intestate, Jane Blackham, had been put in issue at the time of the defendant's application for letters of administration upon her estate, and had been then tried and determined by the Spiritual Court, the finding and sentence of that Court would have been conclusive; but that, inasmuch as such was not shown to have been the case, the fact of marriage could not be inferred from the naked grant of administration, which is on all fours with the following language of Sir W. DeGrey, in the *Duchess of Kingston's Case*: "But neither the judgment of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment," and is also in harmony with the language of this Court in the case of *The People v. Frank*, 28 Cal. 507, where we had occasion to say: "That the law does not favor estoppels, and a party cannot be precluded from giving evidence touching matters directly or collaterally involved in the issue upon the mere suspicion that they have already been determined against him by competent judicial authority; before that can be done it must appear with certainty that such matters have been so determined." A construction similar to the foregoing was given to the language of Lord Holt in *Blackham's Case* by the Lord Chancellor in *Barrs v. Jackson*, 19 Eng. Ch. R. 587; 1 Phillips, 588.)

The case of *Bouchier v. Taylor*, 4 Brown's Cases in Parlia-

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ment, 708, was a bill in equity by Taylor and wife against Bouchier and others, praying an account to them for all the personal estate of one Ann Millington who died intestate, and upon whose estate Bouchier had been granted letters of administration. Taylor and wife claimed under one Alice Merchant, who, as they alleged, was cousin-german and next of kin to Ann Millington. It appeared from the pleadings, among other things, that on the death of Ann Millington, Bouchier and his sisters, being cousins-german once removed, and, as they supposed, the only next of kin to the intestate, made application to the Prerogative Court of the Archbishop of Canterbury for a grant of letters of administration upon her estate to Bouchier. That this application had been contested, among others, by Alice Merchant, who had there alleged that she was cousin-german and next of kin to the intestate, and therefore entitled to the administration. That the truth of that allegation had been tried by the Prerogative Court and found against her, and that a decree had been pronounced to the effect that Bouchier was the lawful cousin-german once removed and the next of kin of Ann Millington, and therefore entitled to administration, which was accordingly granted to him. Upon this state of facts Lord Chancellor Bathurst directed an issue as to whether Alice Merchant was the cousin-german and next of kin of Ann Millington at the time of her death. From this order Bouchier appealed to the High Court of Parliament, and it was contended on his behalf, among other things, that the sentence of the Prerogative Court, by which letters of administration had been granted to Bouchier, was conclusive upon the issue directed by the Lord Chancellor, and that the Court of Chancery had no power to direct it to be tried, but was bound by the sentence of the Prerogative Court. The contrary doctrine was contended for by the respondent. The judgment was that the order of the Court of Chancery directing the issue be reversed, and the respondent's bill dismissed. So it was held that the sentence of the Prerogative Court was conclusive of the question as to whether Alice Merchant was

the cousin-german and next of kin of Ann Millington at the time of her death.

In *Barrs v. Jackson*, 1 Young and Collyer, 585, 20 Eng. Ch. R. 585, Vice Chancellor Knight Bruce doubted whether the question of the conclusiveness of the sentence of the Prerogative Court was the point upon which the House of Lords decided *Bouchier v. Taylor*, claiming that their judgment could be sustained upon other grounds, and did not therefore necessarily embrace that question. But the Lord Chancellor, in the same case, on appeal from the decision of the Vice Chancellor, came to the opposite conclusion. (*Barrs v. Jackson*, 1 Phillips, 582, 19 Eng. Ch. R. 581.)

Barrs v. Jackson, *supra*, was like in facts the case of *Bouchier v. Taylor*. One Harriet Martindale Smith died unmarried and intestate. Suit was instituted in the Prerogative Court for administration upon the estate. The defendant Jackson claimed the administration on the ground that he was the second cousin and next of kin of the intestate, and Mrs. Barrs, the plaintiff, claimed it upon the ground that she was the niece and next of kin of the intestate. The Prerogative Court decided in favor of Jackson, and the sentence was that administration should be granted to him as next of kin. Afterward, the suit in question for distribution was instituted in the Court of Chancery, in which Mrs. Barrs claimed the residuary estate of the intestate as her niece and next of kin. The defendant Jackson, in his answer, pleaded in bar the sentence of the Ecclesiastical Court, and alleged that the question in issue was the sole question in that Court and was there decided in his favor. The Vice Chancellor held, however, that the judgment of the Ecclesiastical Court was not conclusive, having first come to the conclusion, as already stated, that that point was not decided in *Bouchier v. Taylor*. But on appeal the Lord Chancellor held that the point had been decided in *Bouchier v. Taylor*, and that he was bound by that decision, whatever his individual opinion might be, and that the sentence of the Ecclesiastical Court was therefore conclusive upon the question as to which of the parties was next of kin to the intestate.

It is claimed in this case that the decision of the Vice Chancellor was correct, and that the decision of the Chancellor would have been the same way but for the case of *Bouchier v. Taylor*, which, although binding upon him, is not binding upon this Court; and we are, therefore, urged to adopt the ruling of the Vice Chancellor as being founded on the better reason. It is true that the case of *Bouchier v. Taylor* is, as to this Court, only authority upon the question, and is not binding upon us; but without pausing to consider whether the ruling of the Vice Chancellor is founded on the better reason, we are of opinion that this Court stands in the same relation to the question involved in which the Lord Chancellor stood in *Barrs v. Jackson*. What *Bouchier v. Taylor* was to him, *Gray v. Dougherty*, and more especially *Caperton v. Schmidt*, are to us. In those cases we have carried the doctrine in question to the full extent to which it was carried in *Bouchier v. Taylor*.

Order affirmed.

Mr. Justice SHAFTEE, being disqualified, did not participate in the decision of this case.

APRIL TERM, 1866.

[1867]

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

APRIL TERM, 1866.

JOHN RICHARDSON *v.* JOSEPH SMITH, E. J. LEWIS,
AND H. C. PRATT.

DENIALS IN AN ANSWER.—If the complaint, in an action to recover the possession of personal property, avers that the "plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property."

SAME.—If the plaintiff, in his complaint in an action to recover the possession of personal property, avers that the "defendant wrongfully took the property from the plaintiff's possession, and from thence to the time the action was commenced, wrongfully detained the same property from him," and the defendant, in his answer, denies "that the defendant at any time wrongfully took and detained the property from the plaintiff," the allegation in the complaint is to be deemed admitted.

ANSWER SETTING UP SEIZURE OF GOODS BY ATTACHMENT.—An answer justifying the seizure of personal property by virtue of a writ of attachment issued against a person other than the plaintiff, does not state facts constituting a defense, if it fails to allege that the defendant in the attachment suit was the owner of the property.

INSUFFICIENT DENIAL IN ANSWER.—If the answer does not traverse the material allegations of the complaint, and the new matter contained in it does not state facts sufficient to constitute a defense, and the pleadings are not

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verified, a closing denial stating that "the defendant deny each and every allegation set forth in plaintiff's complaint not consistent with the foregoing answer," fails to raise any issue..

APPEAL from the District Court, Second Judicial District, Tehama County.

The pleadings were not verified.

The plaintiff appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant, contended that the answer confessed the substance of the allegations of the complaint, and cited *Blankman v. Vallejo*, 15 Cal. 644; *Busenius v. Coffee*, 14 Cal. 91; *Kuhland v. Sedgwick*, 17 Cal. 125; and *Van Santvoord's Pleadings*, 248.

On the question whether the rule of construction was the same in case of "verified" and "unverified" answers, he cited *Hensley v. Tartar*, 14 Cal. 508.

W. S. Long, for Respondents.

By the Court, CURREY, C. J.

This action was brought to recover the possession of certain personal property of which the plaintiff alleged in his complaint he was the owner and in the possession at the time it was taken by the defendants. To the complaint the defendants answered, and then the cause was submitted to the Court for judgment upon the pleadings. The Court gave judgment for the defendants. The complaint is in the usual form in such cases, and no question arises as to its sufficiency. It is therein alleged that on a certain day, at the County of Tehama, the plaintiff was the owner and in the possession of the property described in the complaint, which was of the value of twenty-three thousand dollars; and that then and there the defendants wrongfully took from the plaintiff's possession, and from thence to the time the action was commenced wrongfully detained the same property from him, by reason whereof he

had sustained damage, etc. In conclusion, the plaintiff demands judgment for the possession of the property, and if that cannot be had, that then he may have judgment for the value thereof, etc.

The defendants by answer deny that the plaintiff was the owner and entitled to the possession of the property; that the defendants at any time wrongfully took and detained the property from the plaintiff. They also deny that the property was worth twenty-three thousand dollars, and further, they deny directly that plaintiff has been damaged by the detention of the property in the sum of one thousand dollars or in any other sum. Then for an affirmative defense the defendants aver that on the 9th of May, 1864, the defendant Smith, who was then Sheriff of Tehama County, seized and took into his possession the property in controversy as the property of Doll and Simpson, under and by virtue of a writ of attachment issued in an action then pending in the District Court of the Second Judicial District, in which one Corcoran was plaintiff and Doll and Simpson were defendants, and that since that time Smith, as Sheriff of said county, has held said property by virtue of said writ, and that at the time this action was commenced the same property was in the hands of the defendant Lewis as the keeper thereof for the Sheriff. The defendants in conclusion "deny each and every allegation set forth in the plaintiff's complaint not consistent with the foregoing answer."

The only point to be decided in this case is as to the sufficiency of the answer. A brief analysis will show that it fails to traverse any material allegation of the complaint, except the one respecting the damage which the plaintiff had sustained by the alleged wrongful taking and detention of the property. The defendants undertake to meet the averment that plaintiff was the owner and in the possession of the property by denying that he was the owner *and* entitled to the possession of it. This is neither a denial that the plaintiff was the owner of the property nor that he was in possession of it when it was taken from him. He may have been in the

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possession of the property and yet not the owner of it, in which case, as against any one taking and withholding it from him without right, he was entitled to his action for its recovery. The defendants next deny that they, at any time, wrongfully took from the possession of the plaintiff the property and chattels mentioned in the complaint, and also deny that they wrongfully detained from him such property. This is not a denial that they took or withheld from the plaintiff the property in question, but it is an attempt to raise an issue as to the character of the acts complained of, which in an action of this kind cannot be at all material unless the taking and withholding is justified upon some legal ground, which must be pleaded. The taking and detention of the property by the defendants were material and issuable facts, which the plaintiff alleged were wrongful and done without his consent. The answer to this allegation is that they were not wrongful; but nothing is averred by the defendants in justification of the acts with which they are directly charged in the complaint, and which, for want of a traverse, stand confessed. (*Busenius v. Coffee*, 14 Cal. 98.) There is an attempt at a justification under a writ of attachment issued in an action wherein Corcoran was plaintiff and Doll and Simpson were defendants; and it is alleged that the property was taken under the writ of attachment in that action as the property of Doll and Simpson, but there is nothing in the answer showing that Doll and Simpson had any right or interest in or to the property. So far it appears the answer fails to put in issue any material allegation of the complaint.

The closing denial of the answer is in these words: "The defendants deny each and every allegation set forth in the plaintiff's complaint not consistent with the foregoing answer." This qualified denial renders it necessary to ascertain whether there is anything in the complaint which is not consistent with the part of the answer preceding it. We have already seen that the several preceding denials (with a single exception) of the answer may stand as true, and yet the material allegations of the complaint, with one exception, remain uncontroverted.

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The affirmative matter of the answer may be taken as literally true, and still the plaintiff's cause of action is in no particular affected by it. Every allegation of the complaint except that relating to the damage sustained by the plaintiff for the detention of the property may subsist in harmony with, that is, consist or stand with every allegation of the answer except the one denying that plaintiff had sustained any damage by reason of the detention of the property. So that the closing denial of the answer amounts to a repetition of the denial "that plaintiff has been damaged by the detention of said chattels and property in the sum of one thousand dollars, or in any other sum." And this is the utmost limit to which it can upon any just ground be said to extend. We think the judgment should have been for the plaintiff, except as to damage for the detention of the property.

The judgment must be and is hereby reversed, and a new trial granted, with leave to the defendants to amend their answer.

THE PEOPLE v. THE HOME INSURANCE COMPANY.

TAXATION OF UNITED STATES BONDS.—The bonds of the United States, issued in pursuance of the Acts of Congress, are not subject to taxation.

TAXATION OF STATE BONDS.—Bonds of the State of California are personal property within the meaning of the term "personal property" as used in the Revenue Act, and are subject to taxation.

TAXATION OF BONDS IN THIS STATE OWNED BY A FOREIGN CORPORATION.—The bonds of this State owned by a foreign insurance company doing business in this State, and deposited with a banker, in pursuance of the Act "to tax and regulate foreign insurance companies doing business in this State," and under the control of an agent of the company, are subject to taxation in this State.

STATE BONDS ARE PROPERTY.—The bonds of this State which are owned by a foreign insurance company, but kept in this State, in accordance with the Act of the Legislature requiring such companies to deposit bonds here as security for their liabilities, are a portion of the capital of the company, and are property in this State within the meaning of the Revenue Act.

ASSESSMENT OF PERSONAL PROPERTY.—Personal property in this State belonging to a non-resident, may be assessed to such owner, notwithstanding he is a non-resident.

SAME.—If personal property in this State belonging to a non-resident is in the possession of a trustee or agent, it may properly be assessed to the agent or trustee having it in possession.

Argument for The People.

SAME.—An error made by assessing personal property to the wrong owner or claimant, under the Revenue Act of 1857, and Acts amendatory thereof, does not affect the validity of the assessment.

DESCRIPTION OF BONDS ASSESSED.—Bonds of this State belonging to a foreign insurance company, but deposited in this State in accordance with law, when assessed for taxes, are sufficiently described by being designated "money and bonds deposited as per statute."

TAXATION OF FOREIGN INSURANCE COMPANIES.—The percentage on premiums which foreign insurance companies doing business in this State pay to the State under the Act to regulate foreign insurance companies doing business in this State, is not a substitute for taxation.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Delos Lake, and Robert F. Morrison, for the People.

It is admitted that in point of fact the bonds are actually here in the City of San Francisco, but a legal fiction is invoked by which they are transferred to the possession of the insurance company in the City of New York.

A brief examination of the existing law, (and it is similar in its provisions to former laws on this point of general taxation,) will abundantly prove the intention of the Legislature.

Section two of this Act speaks of chattels, debts, the capital stock of corporations, etc. All these are taxable, and the bonds on which the tax was levied in this case are embraced within two, at least, of the above designations. They are both chattels and debts, and they are also included in the term personal property, which shall include all property included in section two, except real property.

The following definitions abundantly support this view:

"**CHATTELS**—A term which includes all kinds of property, except the freehold, or things which are parcel of it. It is a more extensive term than goods and effects." (2 Kent, 401; 1 Bouvier's Law Dictionary, 224.)

"Chattels personal are, properly speaking, things movable, which may be annexed to or dependant upon the person of the owner, and may be carried about with him from one

part of the world to another." (*Adams v. Hackitt*, 7 Cal. 203; *City of New Albany v. Meekin*, 3 Ind. 483; *Story's Conflict of Laws*, 550; 21 Illinois, 62; *International Life Assurance Co. v. Commissioners of Taxes*, 28 Barb. 321; *Mutual Insurance Co. v. Supervisors of Erie*, 4 Com. 442.)

Doyle & Barbour, for the Home Insurance Company.

The State bonds are not assessable here, because they are mere evidences of debt, having no intrinsic value in themselves, but the mere representatives of a claim which has a certain value. The debt which they represent is owned in New York. They do not therefore constitute property within this State, and cannot be assessed here.

The jurisdiction of a State for purposes of taxation, as for all others of sovereignty, is from its own nature limited to its territorial extent; it can no more impose taxes on persons or property not within its territorial jurisdiction, than it can enact laws, render judgments, or otherwise exercise its judicial, executive, or political power over persons or property without its limits. It is well settled that debts in judgment of law follow the person of the owner, and are deemed to be situated wherever he is domiciled. (*Story's Conflict of Laws*, Sec. 362, 362 a; *Lord v. Arnold*, 18 Barb. 105; *People v. Park*, 23 Cal. 138; *People v. Eastman*, 25 Cal. 601.)

Under our system of taxation, two classes of taxable personal property are recognized. The one having a local *situs*, and the other the *situs* of which is determined by the domicile of its owner.

Obviously, if the company had its principal office and place of business in another county of the State, the fact that it had these bonds lying in the vaults of bankers in San Francisco would not subject it to be taxed here on them, and this because the *situs* of the company would draw to it that of the bonds. Now if that be true with reference to the various counties of the State, it seems difficult to suggest any reason why it is not equally true of residence, or *situs*, in or out of

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the State. *Situs*, or locality, if predicable of the State at all, must be of some particular county in the State.

The assessment being incorrect in point of fact, in designating these bonds as money, irregular in form, in lumping under one head moneys and bonds, and unauthorized by the terms of the statute, is void. (*Falkner v. Hunt*, 16 Cal. 172.)

If the bonds in question were taxable at all under the law of this State, they were assessable only to the agents of the company, who had the charge, possession, and control of them, and not to the company itself—in this case to Wells, Fargo & Company. (*Van Rensselaer v. Cottrell*, 7 Barb. 127; *Wilson v. Mayor*, 1 Abbott Pr. R. 26; *Lord v. Arnold*, 18 Barb. 104.)

The Legislature has made these companies the subject of a special tax law which must be deemed to constitute a system complete in itself, and excludes all general enactments on the subject, even if they could otherwise be deemed applicable to the class of persons in question. It cannot be supposed that it was the object of the Legislature to subject these corporations to two different systems of taxation, and subject them to a double burden. (See *N. Y. E. R. R. Co. v. Sabin*, 26 Penn. 243.)

By the Court, SAWYER, J.

The Home Insurance Company is a foreign corporation created by, and existing under the laws of the State of New York, engaged in the business of insuring against loss by fire. Said company has an agency established at the City of San Francisco, under the management of Bigelow & Brother, who are duly authorized to act for the company in the ordinary business of the corporation transacted in the State of California. All the acts required by the Act of 1862, "To tax and regulate foreign insurance companies doing business in this State," as amended by the Act of 1864, have been performed. In pursuance of the provisions of the Act of 1864, the company made a special deposit with Wells, Fargo & Company,

bankers, who were approved by the Controller, of twenty-five bonds of the United States, issued in pursuance of the Acts of Congress, of one thousand dollars each, and fifty bonds of one thousand dollars each, issued by the State of California, in pursuance of "An Act to provide for paying certain equitable claims against the State of California and to contract a funded debt therefor," approved April 28th, 1857; all of which bonds, or the debts represented thereby, belonged to the said Home Insurance Company. These bonds were assessed in the City and County of San Francisco for State, and city and county taxes to "Home Insurance Company of New York, Bigelow Brothers, agents," as "money and bonds deposited as per statute," at fifty thousand dollars, the tax thereon being one thousand four hundred and ninety dollars. An agreed case having been made, stating the foregoing, among other facts, and the question submitted to the District Court of the Fourth Judicial District, whether the said company is lawfully taxable and taxed in respect to the said bonds, it was held by the Court, that the said twenty-five bonds of the United States were not subject to taxation, but that the fifty bonds of the State of California were properly taxable and taxed. Judgment was thereupon entered in favor of the People for the sum of nine hundred and ninety-three dollars thirty-three cents, the amount of the tax levied upon the last named bonds, and against the People as to the balance of tax claimed. Both parties appealed, but the People seem to have abandoned their appeal, as nothing is said about the bonds of the United States. It seems to be now settled that the twenty-five United States bonds are not subject to taxation. (*Bank of Commerce v. New York City*, 2 Black, 620.) But are the fifty bonds of the State of California in any form subject to taxation? That the Legislature has the power to tax these securities, there can be no doubt. So much seems to be conceded. The only question is, has it done so? The Revenue Act provides that, "all property, of every kind and nature whatever, within the State shall be subject to taxation, except," etc.; but the bonds

in question are not included in the specified exceptions. Personal property, for the purposes of taxation, is then classified and defined by the statute. The second class embraces "chattels of every description;" the fourth, "all money at interest or loaned, whether secured by pledges, mortgage or otherwise; all solvent debts exceeding what may be due from such person, corporation, association, or firm." Eighth — "The capital stock of all corporations, companies, associations, firms, or individuals doing business or having an office in this State." Ninth — "All other property, not real estate, which is not otherwise taxed." That these bonds, or that which is evidenced by them, would be property which could be referred to some one or more of these classes, if the owner resided in this State, there can be no doubt. But it is claimed that these bonds are mere evidences of debt, having no intrinsic value; that they are mere representatives of a debt owned in New York; that they have no *situs* apart from the domicile of the owner, which is located without the State; and that, therefore, they do not constitute "property *within* this State." It is true, as a general principle, that, personal property follows the owner, having no *situs* apart from the owner, and is subject to the law of his domicile; but this is a fiction of law, adopted for the purposes and incidents of contracts and descents. It may still, for the purposes of taxation and judicial proceedings, be affected by the law of the place where it is in fact situate. This general principle applies to all personal property, whether corporeal or incorporeal. Story says: "In the next place, let us consider the subject of jurisdiction in regard to property. It will be unnecessary to discuss the matter at large as to personal property, since the general doctrine is not controverted, that although movables are, for many purposes, to be deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields, whenever it is necessary for the purposes of justice, that the actual *situs* of the thing should be examined. A nation, within whose territory any personal property is actually situate, has as entire dominion over it, while therein, in point of sovereignty and jurisdic-

tion, as it has over immovable property situate there. It may regulate its transfer and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property. One of the grounds upon which, as we have seen, jurisdiction is assumed over non-residents is through the instrumentality of their personal property, as well as of their real property, within the local sovereignty. Hence it is, that, whenever personal property is taken by arrest, attachment or execution within a State, the title so acquired under the laws of the State is held valid in every other State; and the *same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of a State.*" (Story on Con. of Laws, Sec. 550.)

Bonds of this State kept here but owned abroad are liable to taxation here.

Whatever the legal fiction may be as to the *situs* of personal property, such as horses, coin and other things of a corporeal nature, they have an actual *situs* which subjects them to the jurisdiction of the Government where that actual *situs* is; and the same is equally true of things incorporeal. Whether tangible or intangible, the rule is, or may be, the same. Debts, whether evidenced by writing or not, may be reached by process of attachment and garnishment under the laws of the domicile of the debtor, and they may also be thus reached under statutory provisions for the purposes of taxation. In the language of Mr. Chief Justice Lourie, in *Finley v. The City of Philadelphia*, 32 Pa. St. R. 381: "There is nothing poetical about tax laws. Wherever they find property, they claim a contribution for its protection, without any special respect to the owner or his occupation." Whether we consider the subject of taxation in this case as "money at interest, or loaned," or "solvent debts," and the bonds as the mere evidence of indebtedness and of no intrinsic value in themselves, or whether they are to be regarded as "capital stock," or, for the purposes of taxation, as in themselves a species of prop-

erty, the thing itself is actually within the jurisdiction of the State. If the bonds themselves are property, they are of course "within the State," but if only evidence of the existence of property in some other form, they represent the thing whatever it is; they are the outward symbols by which its actual presence is manifested, and by means of which it is manipulated and actually controlled, and through which the State can actually subject it to its jurisdiction. For this very purpose the State required these bonds to be deposited within its reach, as a condition precedent to the transaction of any business in the State by the owner. And the Act itself provides, that, "all stocks and bonds in the hands of such banker or bankers so approved by the Controller *shall be liable to attachment or seizure under execution in any suit or judgment against any such company or association.*" And when so attached or seized other bonds must be substituted which "shall equal in value *what may have been sold.*" By seizing and selling the bonds, even if not in themselves property, the thing symbolized or represented by them is seized and sold, and the title of the owners wholly divested and transferred. The State of California itself is the obligor and debtor, and the debtor may, therefore, be regarded as being within the State. Whatever the legal fiction as to the *situs* of these stocks, or the thing represented by them, for certain purposes, may be, it is plain, that there is an actual *situs* in the State, and that the thing constituting the property is within the State and subject to its jurisdiction. We think, therefore, it is "property *within* the State," within the meaning of the provisions of the Revenue Act. And this construction is also supported by authority. The question was made and decided in *Catlin v. Hull*, 21 Vermont, 156. The revenue laws of Vermont provided that personal estate, within the meaning of the Act, should include "all debts due from solvent debtors, whether on account, notes or contract, bond, mortgage or other security." Taxes were assessed in the Town of Orwell, in the State of Vermont, upon property belonging to Thomas A. Hammond, a resident of the City of New York. "This prop-

erty consisted entirely of promissory notes, or choses in action, against individuals in this State, (Vermont,) payable to Thomas A. Hammond. These notes were placed by Hammond in the hands of plaintiff, (one Catlin,) who was a resident of Orwell, as his agent, to be managed by the plaintiff, with a discretionary power to keep them on interest or collect and reloan, as should be most beneficial for Hammond; and most of the notes had been collected by the plaintiff and the money reloaned previous to the making of the grand list on which the taxes in question were assessed; and when new loans were made all notes therefor were payable to Hammond." The moneys had been thus collected, loaned and reloaned by plaintiff, as agent, from February, 1846, until the assessment of the tax in question in 1847. The taxes were assessed against Catlin as "agent of Hammond," separate from Catlin's individual property. The same question as to the *situs* of a debt within the State was made as in this case. The Court say, (p. 158): "It is insisted upon this part of the case, in the first place, by the plaintiff's counsel, that the property of Hammond, of which the plaintiff has the care as his agent, cannot be considered as legally existing in this State; and that this is an attempt to tax property, when neither the property nor the owner is within the State and within the jurisdiction of our laws. We think, however, that this doctrine is quite too refined and artificial to be put to any practical use. The case shows this property to have originally belonged to the father and mother of Hammond, who formerly resided in this State, and died here, and that he inherited the same from them, and that the property has never been removed from this State—unless Hammond may at some time have carried the notes to New York; that the debtors reside in this State, and that the notes are in this State, in the hands of the plaintiff. Of course this property is so far here that it could be attached here and held on debts against Hammond; and if it is not to be treated as actually existing here, it would be very difficult to tell where it is in fact situate." The property was held

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to be "*within the State*," for the purposes of taxation, and properly taxed in the hands of the agent. Again the question as to the *situs* of personal property for purposes of taxation was thoroughly discussed and the true principle stated in *Hoyt v. Com. of Taxes*, 23 N. Y. 225. Personal property actually in New Orleans, owned by Hoyt, a resident of New York, was assessed in New York, the Commissioners having "decided that personal property had no *situs*, but follows the person." And the question arose as to the construction to be given to the words "*within this State*," with reference to personal property, in the provisions of the revenue laws of New York: "All lands and all personal estate *within this State*." The Court say (p. 227): "It is said, however, that personal estate, by fiction of law, has no *situs* away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property, situate in New Orleans and New Jersey, rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law, which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The necessary consequence is, that goods and chattels actually within this State are not here in any legal sense or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign State. On the same ground, if we are to have harmonious rules of law, we ought to relinquish the administration of the effects of a person resident and dying abroad, although the claims of domestic creditors may require such administration. So, in the case of the bankruptcy of such a person, we should at once send abroad his effects, and cannot consistently retain them to satisfy the claims of our own citizens. Again, we ought not to have laws for attaching the personal estate of non-residents, because such laws necessarily assume that it has a *situs* entirely distinct from the owner's domicil. Yet

we do in certain cases administer upon goods and chattels of a foreign decedent; we refuse to give up the effects of a bankrupt until creditors here are paid; and we have laws of attachment against the effects of non-resident debtors. These, and other illustrations which might be mentioned, demonstrate that the fiction of the maxim *mobilia personam sequuntur* is by no means of universal application. Like other fictions it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice, according to the maxim, *in fictione juris semper æquitas existat*. 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from the general rule of law.' * * * * If, then, proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicile, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicile, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given," (p. 229.) The Court further illustrates these views by examples. It is true that the exigencies of that case only required the Court to determine the *situs* of personal property of a corporeal nature. But the general legal fiction knows no distinction between property corporeal and incorporeal. And the views of the learned Judge upon the latter are clearly indicated in the following passage: "This conclusion is intended to embrace only property which is visible and tangible, so as to be capable of a *situs* away from the owner or his domicile; and I do not consider the question in reference to personal estate of a different description. It must be within this State in order to be subject to taxation, for so is the statute; but that may be true of choses in action and

obligations for the payment of money due to a creditor resident here, from a debtor whose domicile is in another State. *If the securities are separated from the person and domicile of the owner, and are actually in the hands of an agent in another State for collection, investment and reinvestment there, it may be that capital thus situated should be regarded as foreign and not domestic, in the absence of any special statutory provision intended for such a case,*" (p. 240.)

In the case now under consideration the securities are separated from the owner and his domicile, and in the hands of an agent in this State, and in the character of property, by the express provisions of the Act requiring the deposit, subjected to the jurisdiction of the State. The case of *Catlin v. Hull*, 21 Vt., is cited by the learned Judge in *Hoyt v. Commissioners of Taxes* with approbation. The case of *Wilson v. Mayor of New York*, cited by the Home Insurance Company, is also referred to and disapproved, (page 236.) The other cases cited from the New York Reports by the Home Insurance Company depend upon peculiar statutory provisions, and have no application; and it is clearly shown in the case of *Hoyt v. Commissioners of Taxes*, that, whenever property of foreign corporations of the class in question has escaped taxation under the laws of New York, it has resulted, not from the fact that the bonds or property itself were not "property *within* the State," within the meaning of the statute, *but from defects in the details of the machinery for assessing and collecting the tax.*

But there seems to be a still stronger reason for regarding State bonds as a species of property within themselves, than in the case of notes and other evidences of debt. They are given for moneys due from the State, it is true, and in a legal sense are evidences of debt. But they are treated in business transactions as other articles of personal property — bought and sold in the market daily at the Stock Board — have a regular market value at all commercial centres, which varies, or may vary from day to day, like other staple articles of commerce. They are purchased for investment, as a man purchases land, and really form a separate and distinct species of estates. So bank

bills are but promises to pay—promissory notes or evidences of indebtedness. But they are used as money, and, like State stocks, in the commercial world have acquired a character different from that of mere evidences of debt. For purposes of taxation, as in business transactions, bank bills would be regarded as money, and not as evidences of solvent debts.

Bonds kept by an insurance company are part of its capital stock.

But these bonds are really a part of the capital stock of the corporation invested in its business. Bonds of the City of Buffalo deposited with the Controller of New York by a foreign insurance company under law similar to our own, where held to be included in the terms personal estate under the statute of New York, relating to taxation, in the *British Com. Ins. Co. v. Com. of Taxes*, 18 Abbott, 130; and it was further held that they constituted a part of its capital stock used in its business. The Court say (p. 130): "The other question is, whether the plaintiffs are liable to be taxed upon the bonds of the City of Buffalo deposited with the Controller. There can be no doubt but that those bonds are included under the term 'personal estate,' as used in the statute; and the only question which can arise is whether it is property invested in any manner in the business which they carry on. Upon this point there can be but little doubt. The statute prohibits any foreign corporation from carrying on the business of life insurance until such company has deposited with the Controller securities to the amount of one hundred thousand dollars for the benefit of the policy holders of the company. (Laws of 1853, Ch. 463, Sec. 15.) The deposit with the Controller is necessarily made in connection with the business of the company—without it they can do no business; and it is so deposited as to be security to those who may hold policies of the company. It is, therefore, used in the business of the company, and, in fact, forms its capital in this State, which is liable to the creditors, and comes within the definition of capital, as defined in *The Mutual Insurance Company v. Supervisors*

of *Erie*, 4 Comst. 442. These securities so deposited with the Controller, form the same kind of capital as that of a domestic corporation incorporated for a similar purpose, in which the capital is the security for those who deal with it. Neither is actually invested in business and used for that purpose, but both form the basis on which the business is transacted, and the security from which payment of claims is to be enforced." (See, also, *Bank of the Republic v. County of Hamilton*, 21 Ill. 62; and *Bank of Commerce v. New York City*, 2 Black, 620.) It was, however, held to be taxable in New York City, because the law expressly required personal property of companies to be taxed at the place of their principal business office. We think the bonds, or at least that which is symbolized or represented by them, are "*property within this State*" within the meaning of the Act. And this view is not in conflict with that adopted in *People v. Park*, 23 Cal. 188, and *People v. Eastman*, 25 Cal. 601. In those cases the owner resided in the State, and there was no occasion to consider whether the actual was different from the fictitious legal *situs* of the "money loaned," or "solvent debt," and, the owner being a resident of the State, it was held that the proper place to tax this species of property, under the statute, was his place of residence.

There does not appear to be any force in the argument that this property cannot be taxed because the owner is not an inhabitant of some county in the State. This is attempted to be inferred from the provision that real estate may be assessed to unknown owners, while it is claimed that there is no such provision as to taxing personal property irrespective of ownership. If there is any defect in this respect, it is not because the property is not taxable, but because there is some defect in the details of the machinery by which the tax is to be apportioned and collected, and we think there is no defect in this respect. The law itself levies the State tax and authorizes the Board of Supervisors to levy the county tax, and directs the tax to be collected. The tax having attached by virtue of the law, the rest relates to apportionment and col-

lection. For this purpose section two provides, that "between the first Monday of February and the second Monday in March in each year, every person, corporation, association, company or firm, owning, etc., or *having possession, charge or control of* * * * any personal property situate, or being within the county, shall deliver to the City and County Assessor, etc., a statement of all * * * personal property, etc., owned, etc., or which is in the *possession, or under the control of such person, firm,*" etc. It further provides that "between the first Monday in March and the first Monday in August, etc., the Assessor shall ascertain, etc., names of all persons, corporations, etc., having the possession, charge, control of, etc., any personal property, etc., and he shall list or assess all such * * * personal property *to the person, firm, etc., owning it or having the possession, charge or control of it, if known to him.*" And further, "provided, all real and personal property shall be assessed to a person, firm, etc., if any owner or claimant shall be known to the Assessor, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same, *and no error in regard to such owner or claimant shall in any way affect the validity of such assessment.*" (Laws 1859, p. 345, Sec. 2.)

We do not see why this detailed mode of proceeding does not fully cover the case. No good reason is apparent for not assessing it, under this provision to the real owner, when known, although a non-resident. But there is no necessity of assessing it as non-resident estate, and personal property is not usually so assessed. In *Hoyt v. The Commissioners of Taxes*, 23 N. Y. 232, it is further said: "Again. I have observed that personal property is not in any case taxed as 'non-resident' estate. But it does not follow that such property may not be assessed here, although the true owner resides elsewhere. The possession of chattels is never vacant, as may be the case in respect to lands. Where it is not in the hands of the owner, it is usually held by some one else, under some agency or trust, and the statutes which have been referred to are comprehensive enough to reach it in most cases when

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actually situated here, notwithstanding the foreign domicile of the general owner. All personal estate within the State is liable to taxation. *It may be within the State in the possession or under the control of a trustee, while the beneficial owner is a resident abroad; and in such case the assessment is to be against the person having the special interest or control. The actual situs and control of the property within the State is the condition which subjects it to taxation. The owner will of course be assessed if he resides here and has it under his own control; if he resides in another State, the result is reached by charging his agent or trustee in the actual possession."*

In this case the statute certainly provides for assessing the property to the person or firm, etc., *having it in possession or under control, and he is the "inhabitant"* mentioned in the statute, if an inhabitant be necessary. And it further provides that personal, as well as real property, may be assessed to "*all owners and claimants,*" etc., "*and that no error in regard to such owner, or claimant, shall in any way affect the validity of such assessment.*" The property, in this instance, was assessed to both the owner and Bigelow Brothers, as their agents having the control of the property. We think that there is no force in the objection that, if liable to be assessed, the bonds should have been assessed to Wells, Fargo & Co. Possibly they *might* have been so assessed, but it does not therefore follow that they *must* be. That firm was simply a depository, having no powers over the bonds except to keep them as a "special deposit." Except so far as the purposes of security are concerned, the bonds were, through its own agents, still under the control of the company owning them. It was to be permitted "to collect the interest or dividends on its bonds or stock so deposited, and from time to time withdraw any of such securities, on depositing with such banker, or bankers, etc., other like securities, or stock, the value of which shall be equal to the value of such as may be withdrawn." (Act to regulate foreign insurance companies, etc., Section 8, as amended in 1864.) The substantial control, then, for all purposes not inconsistent with the

objects for which they were deposited, rested with the agents of the company. But if there was an error in this respect, we have seen, that it *shall not* “*in any way affect the validity of the assessment.*”

Whether the property might have been classed under any one, or all of the heads, “money loaned,” “solvent debts,” “capital stock of a corporation, etc., doing business or having an office in this State,” or “other property not real estate,” we think it was sufficiently described in the assessment as “money and bonds deposited as per statute.” Money is not a very apt term by which to designate the property. But the object of the description is simply to identify the property assessed with reasonable certainty. The whole description pointed directly and in terms that could not be misapprehended by Bigelow Brothers, to the precise property intended.

But one other question remains for consideration. It is insisted that the percentage on premiums, etc., required to be paid by the Act under which the company is doing business in this State, is intended to be a substitute for, and in full of, all taxation. We do not think so. There is nothing in the Act to indicate any such intention. If the company should, for the purposes of its business, purchase a lot and erect a costly building thereon, to be used so far as required as an office, and the rest to be rented, it would hardly be claimed that such real estate would be exempt from taxation under the provisions of the Act. Besides, it is manifest from the provisions of the Act that it was not contemplated that the bonds of this State required to be deposited should be exempt from taxation; for section seven, in express terms, says, that they shall be stocks of this State “*that are not exempt from State taxation.*” We can see no substantial reason for requiring that class of stocks, if it was not contemplated that they should be subject to taxation.

The judgment is affirmed.

Statement of Facts.

EDWARD EWALD v. HENRY A. LYONS.

ENFORCEMENT OF PAROL CONTRACT IN EQUITY.—If the lessee and lessor enter into a parol agreement with regard to a new lease of the premises the lessee is occupying, and the amount of rent to be paid by the lessee, and improvements made by him and to be made on the premises, and afterwards the lessee executes a lease in writing relating to the same subject matter, containing terms varying from the parol agreement, a Court of equity will not rescind the written lease and enforce the parol contract, nor, unless upon some equitable ground, as mistake, or fraud, will it reform the written lease to make it correspond with the parol contract.

SAME.—A Court of equity will not enforce a parol contract, if, after the same is made, the parties voluntarily enter into a written contract differing in terms from the parol agreement, nor will it substitute the parol contract for the written one.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The plaintiff averred in his complaint that in November, 1857, the defendant leased to one Cicero, for two years, from January 1st, 1858, a lot in San Francisco, with the buildings thereon, known as the Montgomery Baths; that November 1st, 1858, plaintiff purchased the lease from Cicero, and that at the time of the purchase defendant was in the Atlantic States, and he called on defendant's agent and informed him he was going to purchase, but that the premises were in bad repair and he desired to refit them, and wished to know if he did so whether he could have a renewal of the lease for a long term upon the conditions of the existing lease, and was informed by the agent that if he expended money and made the repairs, the lease would be renewed as he desired. That thereupon he purchased the lease, and expended several thousand dollars in making the repairs, and continued to occupy the premises and pay the rent under the old lease until 1861, when the defendant returned to San Francisco. That after defendant returned new repairs were required, and defendant told him he should have the new lease for a long term on the same terms as the old one, and to make the repairs. That in September, 1861, defendant was about to leave for the Atlantic States, and plaintiff and one Ciprico, who was plaintiff's partner, demanded the lease of defendant, but he refused to let

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them have one unless they paid four hundred dollars per month and took it for five years; and told them to leave the premises or sign such a lease; and that fearing they could not get a lease unless they signed such an one, they executed it. That plaintiff had since paid the rent at four hundred dollars per month; and defendant, in 1864, returned to San Francisco, and refused to execute a new lease according to the parol contract, or to make any allowance for improvements or repairs, or for the rent paid in excess of the terms of the parol agreement.

Brooks & Whitney, for Appellant.

The first ground of demurrer is, that the repairs and improvements first mentioned were not made at the request of defendant, and that he did not promise to pay for them. The suit is not brought to recover the cost of these repairs, but to enforce a parol contract performed on the part of plaintiff. The plaintiff, therefore, does not seek to recover in this action the money so expended by him, but asks a specific performance of the contract on the part of the defendant. (*Williams' Equity*, 300, 301; *Gillespie v. Moon*, 2 Johns. Ch. 591; *Kusselbrach v. Livingston*, 4 Johns. Ch. 148.)

The second ground of demurrer is, that the other repairs and improvements were made after the execution of the written lease, by the terms of which no part of the repairs are chargeable on the defendant; nor is there any other agreement set forth by which he is chargeable. In a bill to reform this very lease, it would not be a ground of demurrer that this agreement spoken of is not contained in the lease. Taking the allegations of the bill as true, that would be a good ground for reforming the lease. The fifth ground of demurrer is, that it is not alleged that there was any mistake or fraud in the execution of the lease — no misapprehension of its terms.

It is not necessary that all these grounds should co-exist. It is sufficient that either one exists. The demurrer in effect admits this, and we may admit on our part that there was no mistake or misapprehension. (*Adams' Equity*, 264; 2 Johns.

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Ch. 596; *Brummagin v. Tillinghast*, 18 Cal. 267; *McMillan v. Richards*, 9 Cal. 417.)

Cope, Daingerfield & Hamilton, for Respondent.

We contend that the parol agreement was merged in the written lease, for it is shown that the subject matter was fully considered *before and at the time* of the execution of the lease, and all the authorities are to the effect that prior and contemporaneous parol contracts or agreements are merged in the written agreement. It could not have been a new agreement, for no consideration is shown to have passed to the defendant to sustain it. (2 Phillips' Ev., 6 Am. Ed., 665, 666, and cases cited; *Bingham v. Rogers*, 17 Mass. 571.)

Plaintiff having entered into the written contract of lease with defendant, and paid money on it after the knowledge of the fraud even, if fraud existed, is estopped from denying it; and money paid for fear of pecuniary loss is voluntarily paid. Parsons on Contracts shows that *personal fear* must instigate or prompt the action. (See Vol. 1, p. 319; 2 Abbott Rep. 339; 2 Kernan, 308; 5 Stanford, 558; *Brummagin v. Tillinghast*, 18 Cal. 276; *McMillan v. Richards*, 9 Cal. 365.)

Although the law always favors infants, payments of rent by them even, after they become capable of contracting, will ratify a contract where there was no duress or actual fraud. (Story on Contracts, Secs. 68-72.) In this case rent has been paid under the contract between four and five years, and for more than a year after the return of defendant to this State.

By the Court, RHODES, J.

This suit was brought for the purpose of specifically enforcing a parol contract in relation to the leasing of certain premises, and of reforming a lease of the premises that was executed between the defendant on the one part, and the plaintiff and one Ciprico on the other part, and as incidental to such relief to have an account taken between the plaintiff and defendant in respect to certain repairs on the leased premises made by

the defendant, and certain sums alleged to have been paid as rent in excess of the rate provided for in the parol contract. The defendant filed a general demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and specified several distinct causes, and the demurrer having been sustained, the plaintiff appealed.

The demurrer is well taken as to the first three causes specified, if the claim on the account of the repairs made before the execution of the lease to the plaintiff and Ciprico, and those made after the execution of that lease, and the claim for the excess of rent paid, are separate causes of action; for as to the first repairs it is not alleged that the defendant either expressly or impliedly promised to pay for the expenses of such repairs; and as to the second repairs the lease provides that the lessees shall make the repairs at their own expense; and the sum of fifty dollars per month, which is alleged was in excess of the proper rent, formed a part of the four hundred dollars per month covenanted in the lease to be paid by them.

But the plaintiff, as we understand counsel, not controverting this view, holds that they are not separate causes of action, but are merely allegations of matters of fact, showing a performance on his part of the parol agreement entered into between the parties, and which he asks may be ordered to be specifically performed by the defendant, by the execution of a new lease, and by a reformation of the present one. His right to such relief may be tested by the general demurrer.

Specific performance of parol contract.

In respect to the claim for a specific performance, the case, briefly stated, is this: The plaintiff being about to purchase an existing lease, states to the agent of the defendant—the landlord—that he proposes to make certain repairs on the premises, “and he is assured by said agent” that if he shall purchase the lease and make the proposed repairs, the defendant will renew the lease, or execute a new lease upon similar

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terms and conditions, and for a long term. The proposed repairs are made; the defendant knows the purpose and expectation with which they have been and are being made, and tells the plaintiff "to go on, that it is all right and that plaintiff should have the long lease." Subsequently, the plaintiff and defendant and Ciprico meet and execute the lease set out in the complaint, for the term of five years, at an increased rent, containing a covenant of the lessees to repair at their own expense. The lessees execute the lease, because they think the terms are the best they could, under the circumstances, procure from the defendant, and they have paid the rent at the increased rate, up to the commencement of this action.

The plaintiff was ever entitled to a decree for the specific performance of the parol contract, on the ground of the "part performance" asserted by him, the right to that relief was as fully matured and capable of being enforced immediately before the execution of the lease to him and Ciprico as at any previous time. But if parties, knowing, as they are presumed to know, the terms of their parol agreement, and what has been done under it, deliberately enter into a contract in writing, relating to the same subject matter, containing terms varying from those mentioned in the parol agreement, the Court will not rescind the written contract and set up the prior parol contract, under the pretense of specifically enforcing the performance of a contract. To do so would be to add a new class to the wards in chancery. The case is but the ordinary case of a contract in writing, in which the terms are harder than one of the parties had been led by the previous conversations or parol agreements to expect, but which he, with a full knowledge of its terms, does accept and execute. For a party to invoke the interposition of a Court of equity in such a case, is, in effect, to ask the Court to revise his own discretion.

The claim to have the lease reformed is only ancillary to that for the specific performance of the parol agreement, and it depends on the same facts and a few additional ones, that

are unnecessary to be stated; for they amount only to apprehensions on the part of the plaintiff and Ciprico of impending injury to their interests, but do not show a mistake—which is the usual grounds upon which Courts proceed in reforming contracts—nor such duress or fraud as will entitle him to any relief in equity. The situation of the plaintiff and Ciprico, of which complaint is made in argument, that the defendant took undue advantage, consisted in the fact that they were in the possession of premises after the expiration of the lease under which they entered, and that during their tenancy they had made repairs, which added to the rent paid, exceeded the value of their use and occupation, without having procured from the landlord an agreement in writing to secure the repayment of the expenses incurred by them in making the repairs; and that while affairs were in that condition, the defendant told them that if they did not choose to accept the lease offered, they could leave the premises. After consideration they accepted and executed the lease; and there the Court must leave them, unless it can be shown that the Court has authority which has never been attributed to it, to substitute an agreement differing in its terms, for the one the parties have freely and voluntarily executed.

Judgment affirmed.

JOHN WALDIE v. J. G. DOLL.

PLEDGE OF AN UNDIVIDED HALF OF PROPERTY.—S. a wagon maker, and W. a blacksmith, entered into an arrangement for the building of wagons, by which S. was to do the woodwork, and W. the ironwork, and W. was also to furnish the materials for the woodwork, for which he was to have a lien as security on the interest of S. in the wagons. *Held*, that the contract constituted an hypothecation of the interest of S. in the wagons while they were being made, and that when the wagons came into the possession of W., he became a pledgee in possession thereof, and was entitled to retain such possession until paid.

POSSESSION OF PERSONAL PROPERTY.—Where two parties own wagons in common, and one pledges his half to the other for advances, if the pledgee keeps the wagons on his premises, and marks them with his name, and exercises control over them, the mere fact that the pledgor is painting them, does not show a surrender of possession by the bailee.

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ERROR MUST BE SHOWN.—The appellate Court will not assume that the Court below committed error unless the record shows wherein, and one who alleges error must rely on the record to disclose it.

RULE OF DISTRICT COURT AS TO INSTRUCTIONS.—If there is a rule of the District Court requiring instructions to be handed to the Judge by a certain time in the progress of the trial, it is not error for the Court to refuse to give instructions not handed to the Judge in time.

READING INSTRUCTIONS TO THE JURY.—Instructions asked by counsel, and refused by the Court, should not be read in the hearing of the jury.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

R. C. Clark, and *George R. Moore*, for Respondent.

By the Court, CURREY, C. J.

On the 12th of November, 1864, J. G. Doll commenced an action in the District Court of the Sixth Judicial District against one J. P. Shaffer to recover the amount due on two promissory notes, and caused to be attached therein three wagons as security for the satisfaction of any judgment that he might recover in such action. Subsequently in the same month judgment was obtained in the suit against Shaffer for seven hundred and thirteen dollars, and thereafter an execution was issued thereon, and on the 8th of December of the same year the property attached was sold to Doll by the Sheriff of Sacramento County under and by virtue of the judgment and execution against Shaffer. The plaintiff, Waldie, claimed the wagons, and after they were sold and delivered to Doll demanded them of him, and upon his refusal to deliver the property in compliance with such demand, the plaintiff brought this action for their recovery, or their value in case the possession thereof could not be obtained, and for damages, etc.

The plaintiff's complaint consists of two counts. In one of them the plaintiff alleges that he was the owner and in pos-

session of the wagons at the time they came to the defendant's possession. In the other he alleges that he and Shaffer were the owners in common of certain personal property consisting of three wagons, and that Shaffer, being indebted to him in the sum of five hundred dollars with some interest thereon, pledged his interest in these wagons to the plaintiff to secure said indebtedness and the interest, and at the same time placed the property in the actual possession and under the exclusive control of the plaintiff, and also invested him with full power to sell and dispose of the same and to apply the proceeds arising therefrom to the payment of the amount due and to become due. In each count the property therein described is alleged to be of the value in the aggregate of one thousand dollars. Two of the wagons mentioned in the first count correspond in description with two of the wagons described in the second count, but it does not appear from the complaint that the two counts were intended to describe the same property, but from the whole complaint it is evident the plaintiff intended the second count as a statement of the cause of action on which he relied for a recovery.

The defendant's answer controverts most of the material allegations of the complaint. The defendant further answering avers that the property was seized and taken by the Sheriff under the writ of attachment and afterward came to the defendant's possession by purchase at the sale under the execution. And he alleges that when the wagons were so seized and taken by the Sheriff, Shaffer had the actual possession of them and was the owner of one half part thereof and so continued to be until they were sold by the Sheriff to the defendant, who by his purchase became the owner of one half of the property, and equally with the plaintiff became entitled to the possession of the same; that immediately after he so purchased he offered to the plaintiff to recognize him as the owner of an undivided half of the wagons in common with himself. He then charges that the pretended pledging of the property was a fraudulent contrivance on the part of Shaffer to enable him, with the assistance of the plaintiff, to

cheat and defraud his creditors, and further that such pretended pledging was void as against the defendant for want of an actual delivery and change of the possession of the property or any part thereof. The issue joined was tried before a jury who rendered a verdict for the plaintiff on which judgment was entered.

The appeal is from the judgment and from an order refusing a new trial.

In October, 1862, Shaffer, who was a wagon maker, engaged in the business of making wagons at the shop of the plaintiff in the City of Sacramento. By an arrangement between the plaintiff and Shaffer, the latter was to do the woodwork, and the former, who was a blacksmith, was to do the ironwork necessary to the construction of the wagons, after which it was a part of the business of Shaffer to paint them. Shaffer had not the means with which to procure the materials necessary for his part of the work; and the result was, that plaintiff furnished timber and money to Shaffer for the purpose, upon the agreement that plaintiff should have and hold the wagons until, by the moneys arising from sales thereof, he should be reimbursed for his advancements made on behalf of Shaffer. The agreement between the parties, as testified to by the plaintiff, was, that Shaffer should carry on the wagon making business and the plaintiff the blacksmithing business, and that Shaffer should have for his own use and benefit the business of repairing wagons, and that the new wagons to be built by their joint labor should belong to the plaintiff until he was fully paid the money due him. The plaintiff further testified that he advanced to Shaffer five hundred dollars' worth of timber in October, 1862, and thereafter all the additional timber used by him in the business. Some time before the attachment was levied, Shaffer sold out his interest in the wagons to one Keseberg, when he instructed the plaintiff that if the wagons were sold for more than was due him, that then the plaintiff should pay the excess belonging to Shaffer to Keseberg, and to this the plaintiff assented. Shaffer testified in effect that he was to have a half interest in

the wagons when the materials of which they were made were paid for, and that from his half the five hundred dollars due the plaintiff was to be deducted. The evidence of the witnesses is exceedingly loose in respect to the exact relation which the parties to this wagon making business sustained to each other by their original agreement or understanding. The theory upon which the action was tried was, that Shaffer and Waldie, in the first place, contemplated by their arrangement that they should own in common the wagons which they might make, and so the respective attorneys of the parties to this action seemed in their pleadings to regard the position of the contracting parties, and so we shall regard it. Then the substance and effect of the arrangement between the plaintiff and Shaffer was, that the wagons in question should, to the extent of Shaffer's interest therein, stand pledged to the plaintiff, as soon as manufactured, as security for the money due and to become due. This arrangement was in its nature a contract for the hypothecation of the wagons as they should be brought into being by the labor and skill of the workmen; but as soon as they came into existence and passed into the possession of the plaintiff, his right as pledgee of Shaffer's half attached. So it was held in the case of *Macomber v. Parker*, 14 Pick. 497, where a brickmaker stipulated with the lessees of a brick yard, in which he manufactured bricks, that the lessees should retain the bricks to be made there as security for their advances to him. (Story on Bail, Secs. 290, 294.)

As between the plaintiff and Shaffer, there can be no question as to which was entitled to the possession of the wagons and to the proceeds of sales thereof in the first instance. The plaintiff had the right to their possession, and the authority to sell them and to appropriate from the money arising from the half which stood pledged, sufficient, if it amounted to that, to pay him the sum due. Then the main question to be considered is whether the possession which the plaintiff had of the property when it was attached was open and exclusive, and such as to protect it from the creditor of Shaffer. We are of

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opinion that it was. At that time the wagons had been in the exclusive possession of the plaintiff for at least a month. They were marked with the plaintiff's name as maker, and were kept by him on his own premises. The plaintiff sustained the relation to them which owners usually occupy to their property. His possession was open and well calculated to give notice to everybody concerned that it was substantial. Though Shaffer was engaged at the time they were seized by the Sheriff in painting one of the wagons, that fact when considered in its relation to the subject and to the circumstances in evidence, does not show any surrender on the part of the plaintiff of the actual possession of the property to Shaffer. We think the case in principle falls closely within the rule laid down in *Stevens v. Irwin*, 15 Cal. 506.

The appellant complains that the plaintiff was permitted to produce evidence to the effect that Shaffer was to own no interest in the wagons until the plaintiff was paid for his advance, on the ground that such evidence was in contradiction of the complaint that Shaffer, as the owner of an undivided half of the wagons, pledged his interest therein to the plaintiff to secure the debt due him. The testimony to which the appellant refers as erroneously admitted does not even tend to prove the fact that Shaffer was to own no interest in the wagons before the plaintiff's advances were paid. On the contrary, it tends to establish the allegations of the second count of the complaint, and was therefore admissible.

There is nothing in the record to support the error assigned on the part of the appellant, on the ground that he was not allowed to show by Shaffer, on his cross examination, that he transferred the wagons to the plaintiff in order to cheat his creditors.

During the argument of the cause before the jury, the Judge said that as he was then advised "he should hold that the Statute of Frauds did not conflict with an arrangement such as was entered into—that the statute, as near as he could remember, did not in cases of this kind, where the pledgor had a half interest and the pledgee was the owner of the

other half, require that the pledgor should give up and abandon it — leave the building in which the property was located." To this the defendant excepted, and on this appeal assigns this remark of the Judge as erroneous. What was said by counsel that rendered what the Judge so said pertinent to the issue, we are not advised by the record, or otherwise. As the matter stands it is impossible to say that it was of such a character as could have done harm to the defendant. It is well understood that this Court will not assume that the Court below committed an error unless the record shows wherein; and it is equally well understood that the party who alleges error must rely on the record as affirmatively disclosing it. We are not satisfied that the remark was not entirely true, though it would seem to be, standing alone, without any pertinent application to anything before the Court or jury.

The remaining point to be considered is, that the Court refused to give two instructions to the jury requested on behalf of the defendant. These requested instructions are set forth in the record. If it be assumed that they are a correct statement of legal propositions involved in the controversy, it does not appear that they were read in the hearing of the jury. We are not to presume that they were, because, to have read them in the hearing of the jury before they were passed upon by the Court, would have been an improper practice; and even after they were passed upon by the Court, it would have been improper to have allowed the jury to know what they were, unless given to them by the Court. These requested instructions were refused for two reasons, as stated by the Judge in writing as follows: "First, that the same are not law; and second, that under the rule of the Court they are not asked in time." If either of the reasons assigned by the Judge for refusing to instruct the jury as requested be valid, the refusal cannot be alleged as error. Without saying whether the requested instructions were good law, or otherwise, we think the Court was justified in rejecting them, because they were not submit-

Points decided.

ted as required by a rule of the Court. (*People v. Sears*, 18 Cal. 635.)

The judgment must be and is hereby affirmed.

THE PEOPLE v. WILLIAM JOCELYN.

PLEA IN CRIMINAL CASE.—If the defendant in a criminal case refuses to plead after his demurrer to the indictment has been overruled, the Court may direct a plea of not guilty to be entered for him.

ERROR.—The record must affirmatively show error; the appellate Court will not presume it.

AFFIDAVIT FOR A CONTINUANCE.—An affidavit for a continuance in a criminal case should show, not only that efforts have been made to find the absent witness, but also, if service of a subpoena has been made on him, should show that it was such kind of service as he was bound to obey.

NEW TRIAL ON GROUND OF DENIAL OF CONTINUANCE.—On an application for a new trial on the ground that the Court denied a continuance, in a criminal as well as in a civil case, the defendant should procure the affidavits of the absent witnesses, showing that they can testify to the facts sought to be proved, or give good reason for not obtaining such affidavits.

WITNESS IN CRIMINAL CASE.—A witness, not examined before the grand jury, whose name is not indorsed on the indictment, may be examined by the People on the trial.

SURPRISE A GROUND FOR NEW TRIAL.—A new trial will not be granted in a criminal case on the ground of being taken by surprise by the testimony of a witness, unless the affidavits show that the testimony of the witness was not true.

APPEAL from the County Court, Colusa County.

The defendant, with two others, was indicted for grand larceny in stealing cattle. Having been convicted and sentenced, he appealed.

The other facts are stated in the opinion of the Court.

J. O. Goodman, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SAWYER, J.

The point that the Court erred in directing a plea of not guilty to be entered on the refusal of defendant to plead further after overruling the demurrer to the indictment, is answered by the case of *The People v. King*, 28 Cal. 265.

It does not appear what the ruling of the Court was on the motion for an attachment for witnesses. It may have been granted, for aught that appears to the contrary in the record. The motion was a different one from the motion for continuance, and it does not appear upon what it was based. Neither does it appear that any exception was taken to any ruling made on the motion, or for a refusal to rule at all upon it. The record must affirmatively show error — we cannot presume it.

There does not appear to us to be any error in the denial of the motion for continuance. It does not appear that any particular effort was made to find the witnesses in Colusa County. Nor is it shown that any service was made on the witnesses in El Dorado County which they were bound to notice. On both these points see *People v. Williams*, 24 Cal. 37. Besides, on the motion for new trial in such cases, the affidavits of the absent witnesses should be obtained to show that they can testify to the facts sought to be proved, or some good reason given for not obtaining them. (*People v. DeLacey*, 28 Cal. 589.) We cannot see from the record that the Court did not soundly exercise its discretion in denying the continuance.

We know of no provision or rule that forbids the examination by the people, on the trial of a criminal case, of a witness whose name has not been indorsed on the indictment, without first giving notice of such intended examination. None has been called to our attention. The name of a witness who has been examined before the grand jury must be indorsed on the indictment, or the indictment will be set aside on motion of the defendant. Even in such case the objection must be taken promptly, or it will be waived. (*People v. Lopez*, 26

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Cal. 112.) But this provision of the Criminal Practice Act has no application to witnesses who have not appeared before the grand jury. In practice, probably, in almost every case tried, witnesses, other than those who were before the grand jury, are sworn and examined on the trial. The same rule in respect to surprise must prevail in the case of the examination of such witnesses as applies to other evidence by means of which the defendant is surprised. In this case the defendant does not show, either in his affidavit of surprise or motion for continuance, or in his proceeding on motion for new trial, that the testimony of the witnesses introduced against his objection was not true, or that he could have obviated it by other testimony if a continuance had been granted or a new trial had. The principle of the case of *People v. De Lacey* is applicable here also. There is nothing in this ruling inconsistent with the case of *People v. Symonds*, 22 Cal. 353, cited by appellant.

There was no error in refusing the eighth instruction. (1 Whart. Crim. Law, Secs. 361, 613; 1 Bish. Crim. Law, Sec. 540, and cases cited.)

Judgment affirmed.

CHARLES CAMDEN v. MARGARET MULLEN AND LAWRENCE MULLEN.

A PROMISSORY NOTE AND MORTGAGE OF SOLE TRADER.—A married woman who became a sole trader under the Act of 1852, for the purpose of keeping a public house and farming, could lawfully execute and deliver in her own name a valid promissory note for the purchase money of land conveyed to her for use in said business, and could also execute, in her own name, a valid mortgage on the same to secure the purchase money.

PURCHASE OF PROPERTY BY SOLE TRADER.—The question whether property purchased by a sole trader was bought for use in her business as sole trader, is one of fact.

VERDICT IN ANSWER.—An averment in a complaint that the defendant, since November, 1893, "has continued to possess and occupy said land and premises, and use the same in her said sole trader business," is not denied by a denial in the answer that defendant "has continued, since the 9th day of November, 1893, to occupy or use the said premises in her business as such sole trader."

APPEAL from the District Court, Ninth Judicial District, Shasta County.

Margaret Mullen, in 1858, was a sole trader, and purchased from plaintiff a tract of land to work as such sole trader. For a part of the purchase money, she and her husband, Lawrence Mullen, executed to plaintiff their joint promissory notes, and jointly executed a mortgage on the land to secure the notes. This action was brought against both husband and wife, to obtain a joint judgment on the notes, and to foreclose the mortgage. Lawrence Mullen suffered a default. His wife answered. The Court rendered a judgment foreclosing the mortgage, and directing an application of the proceeds of sale on the amount due and costs; and further directing, that if the same were insufficient, the defendants pay to the plaintiff the amount of the deficiency. Margaret Mullen appealed.

George Cadwalader, and Warner Earll, for Appellant.

R. T. Sprague, for Respondent.

By the Court, RHODES, J.

The only question requiring consideration is whether a married woman, who had availed herself of the provision of the Act of 1852, to authorize married women to transact business in their own names as sole traders, and had declared her intention to conduct and carry on the business of keeping a public hotel or eating house, and of carrying on a general farming and ranching business, in her own name and on her own account, could, while that statute remained in force, execute in her own name a valid promissory note for a part of the purchase money for a tract of land sold and conveyed to her, and could execute in her individual name, without joining her husband, a valid mortgage of the premises, to secure the payment of the promissory note.

The statutes of this State defining the rights of husband and wife, have made provision for the acquisition, management,

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control and disposition of the separate property of either the husband or the wife, and the common property of both; and by the Act of 1852 provision was made for a different character of property, which is the separate property of the wife, but is not to be classed with the separate property described in the Act defining the rights of husband and wife. It may be acquired by her by purchase for a pecuniary consideration, or as the result of her own earnings, but it does not become common property, and is not subject to the control of the husband. The third section of the Act provides that after the wife has duly made and recorded her declaration, she shall be entitled to carry on in her own name the business specified in her declaration, and that "the property, revenue, moneys and debts and credits so invested shall belong exclusively" to her; and that she "shall be allowed all the privileges, and be liable to all the legal processes now or hereafter provided by law against debtors and creditors." The language of the Act, though not as lucid in every respect as might be desired, indicates the intent of the Legislature, that in respect to her business, as specified in her declaration, and the property invested therein, she shall be deemed a *feme sole*, possessing all the rights, powers and privileges, and subject to all the liabilities in respect to such business and property that she would possess and be subject to, were she unmarried. Such is the construction given to this statute in *McCune v. McGarvey*, 6 Cal. 497; *Guttman v. Scannell*, 7 Cal. 455; and *Melcher v. Kuhlman*, 22 Cal. 523; and the doctrine is recognized in *Alverson v. Jones*, 10 Cal. 12; *Maclay v. Love*, 25 Cal. 367, and other cases.

The right and capacity to purchase property in her own name, to be used about her business, is necessarily incident to the power conferred upon her to act as a *feme sole* in such business; and in conducting the business of farming we can see no objection to her purchasing lands, that would not equally apply to a purchase of grain for seed. Conceding to her the capacity to effect a purchase of property to be used in her business, that a *feme sole* possesses, her authority to make

the purchase on credit as well as on any of the usual terms of sale, cannot be doubted.

The conveyance of the land by the plaintiff to the defendants, and the notes and mortgage executed by them to the plaintiff, to secure a part of the purchase money, constitute one transaction, and her liability on the mortgage rests upon the same principles as her liability on the notes. To deny her the power, without the aid of her husband, to create a lien upon the property purchased by her on credit, to secure the purchase money, subjects the property invested in her business to some extent to the control of her husband; and while it treats her as a *feme sole* in making the purchase, converts her into a *feme covert* when payment is attempted to be enforced by process of law.

The property must be such as is acquired by her for use in her business; and the question whether it was acquired for that purpose is a question of fact. The Court found that she "executed and delivered the said notes and mortgage in the course of her business as such sole trader, for the purpose of carrying on said business," and the evidence tends to prove the fact as found. And besides this, the allegation in the complaint that she, in connection with her co-defendant, has since the time of the purchase of the lands continued to possess and occupy the land and use the same in her business as such sole trader, is not denied by the answer, for the denial attempted amounts only to a denial of her continuous occupation. The use to which the property was put during that time, serves to show the purpose for which it was purchased.

Judgment affirmed.

E. M. HALL, B. C. ALLEN, AND HENRY HUBBARD v.
J. R. CRANDALL, E. M. BANVARD, AND JAMES
NEAL.

LIABILITY ON PROMISSORY NOTE OF A CORPORATION.— At common law the officers of a corporation are not liable personally on a promissory note of the cor-

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poration, made by them as such officers, in which the promise to pay is made by the corporation, and not by the officers personally.

LIABILITY OF AGENT ON CONTRACT.—If an agent, in executing a contract, use terms which charge himself, he may be sued upon the instrument itself as the contracting party; but it is otherwise if the contract contains terms which bind the principal only.

WHEN AGENT ACTS WITHOUT AUTHORITY OF PRINCIPAL.—When the contract of the officers of a corporation binds the corporation by its terms, and not the officers personally, and the contract is made without authority, so that the corporation is not holden on it if any personal liability exists against the officers, it results from the wrong done by them in undertaking to act without authority.

DIRECTORS OF A TURNPIKE COMPANY.—The Directors of a corporation formed for the construction of plank or turnpike roads are not liable personally, under the nineteenth section of the Act creating such corporations, on a contract made by them, which by its terms binds the corporation, unless the stockholders have adopted by-laws, and the same have been filed in the Recorder's office, and the contract is made in violation of the by-laws.

POWER OF DIRECTORS OF TURNPIKE COMPANY.—The Directors of a corporation formed for the construction of plank or turnpike roads are not vested with any power by the statute until the stockholders have adopted by-laws defining their powers, and the same have been filed in the Recorder's office.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The action was brought on the following promissory note:

“AUBURN, April 1st, 1863.

“Eight months from date, for value received, the Auburn Turnpike Company promise to pay Hall & Allen, at their banking house in Auburn, in gold coin currency of the United States, three thousand two hundred and four dollars, with interest at two per cent per month from date until paid. The above indebtedness is subject to a claim held by Marriner and Willard of \$5,500.

“J. R. CRANDALL,
“President.

“E. M. BANVARD, Secretary.
“\$3,204.”

The complaint averred that the Auburn Turnpike Company was a corporation under the Act authorizing the construction of plank or turnpike roads, passed May 12th, 1853, and that defendants were its Directors, and that the company had not

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adopted any by-laws, and that at the date of the note E. M. Banvard was indebted to the plaintiffs for money loaned, and the note was given for the same by the assent of the Directors.

The other facts are stated in the opinion of the Court.

Charles A. Tuttle, for Appellants.

The word "otherwise" in the nineteenth section of the Act for the formation of turnpike companies, refers both to the filing of the by-laws and the powers they confer. The personal liability of the Directors attaches when they fail to file the by-laws, or having filed, make a contract in behalf of the corporation not authorized by them.

The law does not make the Directors liable in any case where the corporation would be, but seems to contemplate that they shall be personally liable in every case where they contract in behalf of the corporation, and the contract is void as to the corporation.

This is made plain by the first part of the section, which provides that the "Directors and officers shall have no powers except such as are given by the stockholders in their resolutions and by-laws."

The law has released road companies from all liability on contracts made by their Directors in their behalf not specially authorized by their by-laws, and has substituted in place thereof the personal liability of the Directors.

George Cadwalader, for Respondents.

It will be noted that the statute does not pretend to create a liability, except after the filing of the "by-laws" and a violation thereof by the officers of the corporation. In this case, there were no "by-laws" filed, and none in existence to be put on record, and therefore the conditions precedent upon which the statutory obligation against respondents could alone arise, were never fulfilled. No "by-laws" were filed—none were violated in giving the company's obligation for the debt of Banvard.

The nineteenth section intends that the stockholders should make the "by-laws," thereby either expressing or limiting the authority of the Board of Trustees, and the stockholders having neglected to make "by-laws," it is impossible to hold that the case of appellants comes even within the neighborhood of the statutory penalty.

In at least three points there was no fulfilment of the statutory conditions to create the liability on the part of the respondents—here sought to be enforced. Where anything is taken on conditions precedent, the rule is well settled that there must be a punctilious performance thereof.

By the Court, SANDERSON, J.

The note in suit is the same which was sued upon in *Hall et al. v. The Auburn Turnpike Company*, 27 Cal. 255. For reasons there stated we held that the note was not binding upon the company. It is now sought by this action to hold the Directors of the company personally liable.

It is claimed that the defendants are liable: first—because the nineteenth section of the Act under which the company was incorporated so provides; and second—because they are made liable by the common law.

We are of the opinion that the second point cannot be sustained, for the reason that the action has not been brought upon the theory of a common law liability. The facts stated in the complaint and found by the Court are not only not marshalled with reference to a common law liability, but in our judgment are not sufficiently stated to fairly present that question. On the contrary the complaint is fashioned solely upon the theory advanced in the first point, and it is apparent from the record that the case was tried, argued and determined throughout in the Court below upon the theory of a statutory liability. No point was made upon the common law, as clearly appears from the opinion delivered by the District Judge. Moreover, the case was first submitted in this Court upon that

theory, and the point that the defendants were liable at common law was afterwards made in a supplemental brief.

But upon this head it is sufficient to say that the present action is founded strictly upon the note itself, and not upon the wrong done to the plaintiffs by the defendants in executing it without authority; and we are of the opinion that if the defendants have, by their action in the premises, incurred a personal liability at common law, such liability does not arise from any obligation created by the note itself, but from the wrong done. In all such cases the remedy against the agent is an action to recover the money, if any has been paid him, or the value of the work or labor, if any has been performed for him, under the supposed contract, or special damages resulting to the plaintiff by reason of the defendants' wrong in undertaking to act for another without authority. If an agent in executing a contract, employ terms which, in legal effect, charge himself, he may be sued upon the instrument itself as a contracting party. This is so because by the use of such terms he has made the contract his own. But if the instrument does not contain such terms, or in other words contains language which in legal effect bind the principal only, the agent cannot be sued on the instrument itself for the obvious reason that the contract is not his. If then the contract is not binding upon the principal because the agent had no authority to make it, and is not binding on the agent because it does not contain apt words to charge him personally, it is wholly void. Upon this point there is some conflict of authority, but the better reason, in our judgment, is with those cases which hold the rule to be as above stated. (Story on Agency, Fifth Ed., Sec. 264, *a*, and marginal notes, where the authorities are collected; 1 Parsons on Contracts, 54 to 58; *Abby v. Chase*, 6 Cush. 54. See also *Sayre v. Nichols*, 7 Cal. 538; *Davidson v. Dallas*, 8 Cal. 247; *Haskell v. Cornish*, 13 Cal. 47; *Shaver v. Ocean Mining Company*, 21 Cal. 45, which will be found to bear in some degree upon the question.) Those cases, which hold that the agent may be sued upon the contract itself, treat all matter which the contract contains in relation to the principal as sur-

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plusage, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they themselves have made.

The contract in the present case is not binding upon the supposed principal — the company — because the supposed agents — the defendants — had no authority to make it, as we held in *Hall et al. v. The Auburn Turnpike Company*, 27 Cal. 255. It is not binding upon the defendants, because it does not contain apt words to charge them. From the terms employed the contract is manifestly the contract of the company and not the defendants. It is clear upon inspection of the instrument that the defendants intended to bind the company and not themselves, and that the plaintiffs so understood it. This action therefore being *ex directo* against the defendants on the note itself, cannot, in our judgment, be sustained at common law for reasons which have been already stated. Upon the question whether the plaintiffs can make a case which will charge the defendants at common law, we intimate no opinion. The law as to when an agent who acts without authority renders himself personally liable is not in all respects fully settled, as will be seen by a reference to the authorities cited above; and it would be but idle speculation to discuss a case of which the special facts are not before us. We merely hold that they are not liable at common law upon the note as contracting parties, which is the attitude in which they are now before us. If liable at all in this action, it is by virtue of the nineteenth section of the Act under which the Auburn Turnpike Company was incorporated, (Stats. 1853, p. 173,) which remains to be considered.

That section provides as follows: "Sec. 19. The Board of Directors shall exercise the corporate powers of the company, with such limitations and restrictions and to the extent only that may be prescribed in the by-laws of the company. It is expressly understood that the Directors and officers have no powers except such as are given by the stockholders in their resolutions and by-laws. The Secretary of the company shall file a copy of the by-laws, and all amendments thereto, with

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the County Recorder of each county traversed by the road, for public inspection, from which filing all contracts made by Directors or any officers or agents of the company, in behalf of the company, must be entered into under the powers and by the authority conferred in such by-laws; otherwise all such contracts shall be null and void as against the company, but valid and binding as against each and all the Directors, officers or agents who made such contract, or did not dissent therefrom. A majority of votes at any legal meeting shall be required for the valid enactment of by-laws, passage of resolutions, and in all proceedings of the company; provided that said Board of Directors shall not be empowered in any manner to mortgage or otherwise to hypothecate the property of the company until twenty-five per cent of the capital stock has been paid in and vested in the construction of said road, nor then unless by a vote of two thirds in interest of the stockholders."

At the time the note in suit was given, the Secretary of the company, as appears from the record, had not filed any by-laws in the Recorder's office, nor in fact had any by-laws been adopted by the company. Such being the fact, we are of the opinion that the present case does not fall within the provisions of the Act. The personal liability there created must be measured by the terms employed, and cannot be held to commence sooner in point of time than the period there fixed.

The Act in substance provides that the corporate powers of the company shall be exercised by a Board of Directors, who shall have no powers except such as are conferred by the stockholders in their resolutions or by-laws. So, by virtue of their office only, the Directors acquire no power whatever. Their office is dormant, or without functions, until they have been vested with power by resolutions or by-laws adopted by the stockholders. Until then they have no power *ex officio*, and can do no act and make no contract which will be binding upon the company, so far at least as the statute is concerned. When however by-laws have been adopted and filed as provided, they may exercise the powers thereby conferred,

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but those only, and in the mode only which may be therein provided; and it is only from the filing of the by-laws (so stated in express terms) that all contracts made by the Directors in violation of the by-laws, or in excess of their powers under them, shall be null and void as against the company, but binding upon the Directors making the same, or not dissenting therefrom. Thus the time at which the personal liability of the Directors shall commence is expressly fixed, and made to depend entirely upon the event of filing the by-laws.

The legislative intent would seem to have been to confine the Directors strictly within the powers conferred by the by-laws, with a view to the protection of the stockholders, under penalty of incurring a personal liability. The Legislature seems to have supposed (erroneously, as is shown by the history of this case) that all companies formed under the Act would proceed regularly in accordance with its provisions, and not enter upon the construction of their roads until they had adopted a code of laws defining and prescribing the powers and duties of their managing officers, and therefore seems to have made no provision for such a contingency as has arisen in the present case; for the Directors seem to have gone on and constructed the road of the company without any power whatever to bind the company by their contracts, at least so far as the provisions of the statute are concerned. This anomalous condition of the law arises from the use of the words "from which filing." Strike those words out and insert the word "and," and doubtless what we presume to have been the object of the Legislature would have been accomplished. But as the statute now reads, whenever a company enters upon its work before filing its by-laws, this singular result follows: Acts which are done in excess of power merely are made to entail personal responsibility upon the actors and those not dissenting therefrom; while acts performed when the actors are in all respects without any power whatever are followed by no such consequence. Of the two wrongs the latter would seem to be the greater in degree and

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to merit a remedy at least equally as efficacious as is provided for the former. The anomaly, however, is beyond the reach of judicial correction. If the intent of the Legislature was as we have supposed, it has been so expressed as to defeat itself in part, if not *in toto*, and yet afford judicial construction no opportunity to come to the rescue.

We think the Court did not err in holding that the complaint does not state a cause of action within the statute, and the judgment dismissing it must be affirmed.

Ordered accordingly.

THE PEOPLE v. AH YEK.

INDICTMENT FOR RAPE.—In an indictment for the crime of rape it is not necessary to aver the age of the person charged with committing the rape.

APPEAL from the County Court, Sacramento County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Coffroth & Spaulding, for Appellant, argued that inasmuch as the statute declared that a person of the age of fourteen years or upwards, having carnal knowledge of a child under the age of ten years, was guilty of rape, it was therefore necessary to aver the age of the person charged in the indictment; that the age was the very essence of the statutory offense, and could not be left to conjecture or proof, and cited 1 Hawkins, Chap. 41, Sec. 2; 3 Archibald C. P. 304; 6 Cal. 488; and *People v. Savier*, 14 Cal. 30.

J. G. McCullough, Attorney-General, for the People, contended that it was just as unnecessary to aver that the defendant was fourteen years of age and upwards, as it would be to aver that the prosecutrix was not the defendant's wife; and cited *Com. v. Scannel*, 11 Cushing, 547; *Com. v. Sugland*, 4 Gray, 7.

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By the Court, SAWYER, J.

The defendant was convicted on an indictment for the crime of rape, committed on a child of the age of nineteen months. The first and principal question in the case arises upon demurrer to the indictment. It is claimed, that, because the child is alleged to be of the age of nineteen months, it should also be alleged that the defendant is over the age of fourteen years. But we think the indictment sufficient on this point. The statute defines a rape as follows: "Rape is the carnal knowledge of a female forcibly and against her will." This is the definition of the crime. After providing for the punishment, it adds: "Any person of the age of fourteen years and upward, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent, shall be adjudged guilty of the crime of rape," etc. The indictment would have been good without averring the age of the child. (*Commonwealth v. Sugland*, 4 Gray, 7; *Commonwealth v. Sullivan*, 6 Gray, 479.) The fact that it is averred does not change the rule, and make it necessary to aver the age of the party who commits the offense. In *Commonwealth v. Scannel*, 11 Cush. 548, a similar question was raised. The Court say: "We perceive no ground for arresting judgment in the present case for either of the alleged causes. It is not necessary in an indictment for rape to allege that the defendant is fourteen years of age. It might as well be contended that in all other cases the indictment must allege that the party charged was above the age of seven years. The incapacity of a party by reason of his tender years to commit the crime charged upon him may be a good defense on the trial, as it may negative effectually the charge, but this capacity is not required to be stated in the indictment, and its omission furnishes no ground for arresting the judgment after a verdict against the accused."

It does not appear upon the face of the indictment that defendant was under fourteen years of age, and we see no better reason for averring that he is over fourteen, than in any other criminal case for averring that the party charged is of

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such an age as to render him capable in law of committing the crime. His capacity to commit the crime is as much an element in the crime in one case as in the other.

Conceding this Court to have jurisdiction under the Constitution to reverse a judgment in a criminal case on the ground of insufficiency of evidence to sustain the verdict, we should not be justified in reversing the judgment in this case on that ground.

Judgment affirmed.

HENRY HODGKINS v. MALACHI JORDAN.

FORCIBLE DETAINER.—The declaration of the defendant to the plaintiff, that he will not go off the premises unless put off by force or by law, does not constitute a forcible detainer.

SAME.—The mere surmise of a person, that if he attempts to regain possession, force will be used to prevent it, is not enough to show a forcible detainer, but an attempt must be made to regain possession, and either force, or threats of force, used to resist it.

SAME.—The action of forcible detainer is not intended as a substitute for the action of ejectment.

APPEAL from the County Court, San Joaquin County.

The plaintiff was in possession of a tract of land which was inclosed by a fence, and had been cultivated since 1857. On Saturday, the second day of September, 1864, the defendant went inside the inclosure and erected a small board tenement, and moved into it. On Tuesday following, plaintiff went to defendant and demanded possession, and defendant replied that he was going to stay there until they put him off. Plaintiff afterwards called on defendant several times, and demanded possession, before bringing suit. Suit was commenced April 22d, 1865. Defendant appealed.

The other facts are stated in the opinion of the Court.

Tyler & Cobb, for Appellant.

John B. Hall, for Respondent.

Opinion of the Court — Rhodes, J.

By the Court, RHODES, J.

This is an action of forcible entry and detainer, brought under the Act of 1863. The Court found the forcible detainer as alleged in the complaint. The defendant relies upon the single point that the evidence is insufficient to justify the finding, and in our opinion the point is clearly with him. The evidence in respect to the detainer is well epitomized in one of the findings, in which it is stated "that the plaintiff has often since such entry demanded that the defendant leave the premises and restore possession to the plaintiff, but that the defendant has refused so to do, and has replied to such demands that he would not go off unless put off by force or by law."

It is not indispensable to a recovery for a forcible detainer that actual force be proven, but in the absence of such proof, threats of personal violence, or such conduct as clearly evinces a determination to resist by force the entry of the plaintiff, must be shown. The mere surmise or apprehension of the plaintiff that if he attempts to regain the possession he will be repelled by force, is not enough; but the words or acts of the defendant must manifest the present purpose to resort to force, to defeat the attempt then being made by plaintiff to re-enter into the possession of the premises. The declaration of the defendant that he would remain on the premises until the plaintiff put him off by force or by law, falls far short of a threat of the character we have indicated; and it is not even a threat of forcible resistance, if the plaintiff should thereafter proceed to put him off by force. The action for a forcible detainer is not intended as a substitute for the action of ejectment. The *gravamen* of the first is the wrongful detention of the premises by force — "with strong hand" — and that of the second is the wrongful detainer only. The distinction is as clearly and unmistakably marked, as between a case of forcible entry and a mere trespass upon lands, unaccompanied by force or menaces.

Judgment reversed and cause remanded for a new trial.

THE PEOPLE v. BARON JACOBS.

INDICTMENT FOR ASSAULT WITH DEADLY WEAPON.—An indictment for “an assault with a deadly weapon, with an intent to inflict upon the person of another a bodily injury,” should charge the offense in the language of the statute, and should also allege that the weapon was deadly, or such facts as necessarily show that it was deadly.

APPEAL from the County Court, San Bernardino County.

The facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for the People.

It is not necessary in the commencement of an indictment to designate an offense more definitely than as a felony or misdemeanor. (*People v. Beatty*, 14 Cal. 572.) The indictment need not charge the pistol to be a deadly weapon. (*The State v. Jarott*, 1 Iredell, 87; *The State v. Collins*, 8 Id. 412; *The State v. Craton*, 6 Id. 165; *United States v. Small*, 2 Curtis, 241, 243.)

By the Court, SAWYER, J.

The indictment was designed to be for “an assault with a deadly weapon, etc., with intent to inflict, etc., bodily injury,” etc., under the fiftieth section of the Act concerning crimes and punishments. The indictment charges the defendant with “an assault with intent to inflict upon the person of another bodily injury;” that said Baron Jacobs, etc., “with a certain pistol, etc., did then and there unlawfully make an assault,” etc. A demurrer to the indictment for insufficiency was sustained and the People appealed. The indictment neither follows the language of the statute, nor charges an assault with “a deadly weapon,” nor alleges the weapon to be deadly, nor that the pistol was charged. A pistol may be of such dimensions as to be a deadly weapon without being charged, and it may be so small as to be, without being charged, a very insignificant instrument of assault. There being no averment that the

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pistol was "a deadly weapon," and no fact averred by which the Court could see that it was necessarily such, and the language of the statute not being pursued, we think the indictment insufficient, and that the demurrer was properly sustained.

Judgment affirmed.

TYLER BEACH AND JAMES A. CLAYTON v. AUGUST
GABRIEL *et als.*

LOT IN A PUEBLO.—An ordinance of an Ayuntamiento directing the proper functionary to make a grant of a lot to a person named therein, if he should find that no other person had a better right thereto, does not pass any title to the person named.

STATUTE OF LIMITATIONS.—The Statute of Limitations does not begin to run in relation to pueblo lands until a patent has been issued by the United States.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

Action to recover possession of a lot in the City of San José and within the boundaries of the former Pueblo de San José de Guadalupe. The plaintiffs had by mesne conveyances the title which Maria Rufina Garcia acquired by a grant made by James C. Conroy, First Alcalde of the Pueblo, on the 26th day of December, 1849, of which the following is a copy:

"WHEREAS, Maria Rufina Garcia has applied to this office for a title to the land left her by her father, Francisco Garcia, she having neglected to obtain one until this date:

"This is to certify, that I, James C. Conroy, First Alcalde of the Pueblo de San José de Guadalupe, on the part of said pueblo, for and in consideration of the sum of what is specified by law, to me in hand paid by the said Maria Rufina Garcia, hath sold, transferred, and made over to the said Maria Rufina Garcia all that messuage of land left her by her father, and declared to be all that land fronting on the callajon on

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the north; bounded on the east by the land of James W. Weeks, Esq., and on the south by the land of Juan Sepulvada, and on the west by the Rio.

"To have and to hold the same, with all the rights and privileges thereunto belonging, to her and her assigns forever.

"In witness whereof I have hereunto set my hand and seal, this twenty-second day of December, 1849."

"JAMES C. CONROY,

"First Alcalde District San José."

The defendants had the title acquired by Maria Merced Avila under the following proceedings of the Town Council of the pueblo on the first day of December, 1849:

"A memorial was presented by Don José Arnaz in favor of Maria Merced Avila, in petition of a piece of land containing varas unknown, situated west of the lands of Rufina Garcia and James W. Weeks, and in conformity to petition, it was unanimously ordained that a title be extended to the person interested, conditioned and provided that if no other may show forth a better right.

"ANTONIO MA. PICO, President.

"JAMES W. WEEKS, Secretary."

Defendants and their grantors had been in possession of demanded premises more than five years.

The Court below gave judgment for defendants, and plaintiffs appealed.

Peckham & Payne, for Appellants.

Under the law, as it stood when these proceedings were had, the Alcalde was a member of the Ayuntamiento, and was its presiding officer in the absence of the Prefect and Sub-Prefect. (See Appendix to Debates in California Constitutional Convention, page 31, Sec. 5, Arts. 3, 4, 5, 6, and 7, also page 33, Sec. 6, Art. 9.)

The Prefect had the power, independent of the Ayuntamiento, to regulate the distribution of common lands, but this

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only extended to the temporary use and occupation; he could not sell them or grant the fee. (Id., p. 30, Art. 14, and note.) The municipal lands the Town Council could sell. (Id.) In this case, Pico did not act as Prefect, but he signed as President of the Town Council or Ayuntamiento. His independent power as Prefect was not exercised, or attempted to be. The Alcalde was the executive officer of the Ayuntamiento, and as such, it was his duty to make grants of land sold by them. (*Cohas v. Raisin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 530.) And the Court must take notice that nearly all grants of land in pueblos were made by the Alcaldes, professing to act by virtue of power conferred on them by the Ayuntamientos. (*Cohas v. Raisin*, 3 Cal. 443.) This, we believe, is the first case that has come to the attention of the Court in which a grant by the Ayuntamiento independent of the Alcalde has been sought to be established.

Such being the case, it should appear clearly that the Ayuntamiento in the ordinance before the Court intended that it should operate as a grant *in presenti*, independent of the Alcalde, before the Court should give it that effect.

Another circumstance should be looked at, and that is, the law that when a party applied for a grant a sum of money was to be paid. (*Cohas v. Raisin*, 3 Cal. 443.)

It is evident to our minds that the ordinance was nothing but a direction to the Alcalde to grant a title to the interested party, provided no one showed a better right to the same. Our construction of this ordinance was the cotemporaneous construction placed upon it by the Alcalde, who, we have seen, was a member of the Ayuntamiento, and who, it is fair to presume, voted for it, as it was passed unanimously.

Every presumption is in favor of the validity of the grant by the Alcalde; even a subsequent ordinance of the Ayuntamiento will be presumed if necessary. (*Reynolds v. West*, 1 Cal. 322; *Cohas v. Raisin*, 3 Cal. 443; *Welch v. Sullivan*, 8 Cal. 165; *Hart v. Burnett*, 15 Cal. 530.)

Frederick Hall, for Respondents.

I contend that the words in the ordinance, "conditioned and provided that if no other may show forth a better right," are merely declaratory of what the law is; and if they had not been inserted, the rights of the party would not have been changed. If any other person had a prior or better right, whenever they could show it in a Court of judicature, they would obtain a judgment for the premises; that the recital in the grant made by the Alcalde is no evidence against the respondents; that, so far as this case is concerned, the naked grant, stripped of the recital, is all that the Court can consider. Appellants' title is, then, a subsequently acquired one.

The Court cannot *presume* that the Alcalde had the consent of the Ayuntamiento to make the grant to Rufina Garcia. There can be no presumption against a given fact. The fact is, that the Ayuntamiento had given their consent to another, namely, Avila; and before it can appear that the Ayuntamiento gave their consent subsequently to another, that fact must be affirmatively shown.

Suppose the ordinance under which Maria Avila claims the premises is a "conditional order," what legal proof is there that any condition arose which could divest her of her vested rights? I submit, not the slightest.

Granting for the sake of the argument that it was a conditional order, what proof is there that Garcia showed a better right? Avila was entitled to be heard on that question. Did she ever have such a hearing?

The Alcalde was not authorized by the law of the land to decide whether Avila or Garcia was entitled to the premises. That would have been exercising judicial functions — passing upon the *title* to property, of which Courts of First Instance only could take original cognizance. It was the duty of the Alcalde to have reported to the Ayuntamiento that another party claimed it, if such were the fact. The so-called conditional order in favor of Avila did not authorize the Alcalde to grant the premises to Garcia. He was only the executive

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officer of the pueblo. The granting power was in the Ayuntamiento. The Alcalde could only execute grants in accordance with their will and consent. The import of the said "order" was not, "that if Avila is not entitled to it, Garcia is." It must appear by affirmative proof, or by facts from which the Court will presume that the Ayuntamiento gave their consent that Garcia should have the title, before the appellants can prevail. They are plaintiffs; and before they can sustain an action of ejectment, they must show a perfect title. They never were in possession. As I have before said, there can be no presumption in this case in favor of Garcia, because it affirmatively appears that the Ayuntamiento gave their consent that Avila should have the title.

By the Court, SANDERSON, J.

The ordinance of the 1st of December, 1849, was not the act of Antonio Maria Pico as Prefect, but was, as it purports, the act of the Ayuntamiento, attested by Antonio Maria Pico as President of that body, and James W. Weeks as Secretary. Nor can it be construed to be a grant by the Ayuntamiento of the land in question to Maria Merced de Avila. It is not framed in the language of a grant, either under the Mexican or American system. It is manifestly a mere conditional order or direction on the part of the Ayuntamiento to the proper functionary to the effect that a title to or grant of the land in question be made to Maria Merced de Avila, provided it should appear that no one else had a better right thereto. It is not only not a grant, but it is manifest from the language employed that it was not intended to be. Although made in the English language, it is manifestly fashioned upon the style or mode of expression employed in the Spanish. The word "extended" is used in the sense of the Spanish word "extender," which means, when used in the connection under consideration, "to commit to writing at length," (Spanish and English Dictionary, by Velasquez.) The ordinance being a mere order or direction to the proper functionary to make a

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grant to Maria Merced de Avila, if he should find that no other person had a better right thereto, no title passed thereby.

The point to the effect that the action is barred by the Statute of Limitations is not well made. It was held in *Johnson v. Van Dyke*, 20 Cal. 225, that the statute does not begin to run until the patent has been issued by the United States Government. It appears from the finding that the patent for the land of which the land in controversy is a part had not been issued at the time this action was brought.

Judgment reversed and Court below directed to enter a judgment for the plaintiffs.

Mr. Justice RHODES, being disqualified, did not participate in the decision of this case.

J. W. SULLIVAN AND JAMES D. RYAN v. THE TRIUNFO GOLD AND SILVER MINING COMPANY, AND E. P. FLINT *et als.*, ITS BOARD OF TRUSTEES.

ASSESSMENT ON STOCK OF MINING CORPORATION.—The Board of Trustees of a corporation formed for the purpose of carrying on mining have the power to levy and collect, for the purpose of paying the proper and legal expenses of the company, assessments exceeding ten thousand dollars, even though the by-laws provide that the Trustees shall not have power to incur an indebtedness exceeding ten thousand dollars, and the indebtedness then incurred and existing exceeds that amount.

ENJOINING TRUSTEES OF CORPORATION.—The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

S. M. Wilson, D. S. Wilson, and J. S. Blatchley, for Appellants, argued that the by-laws limiting the amount of debt to

Opinion of the Court — Currey, C. J.

be created could not affect the strangers to whom the money was due, and was binding upon no one but the members and officers of the corporation, and cited *Angell & Ames on Cor.*, 7 Ed. 363, Sec. 359; *Mechanics' Bank v. Smith*, 19 John. 115; and *Susquehanna Insurance Company v. Perrine*, 7 Watts & S. 348. They also argued that the debts were binding on the company, notwithstanding the by-laws, and that the corporation could not disaffirm its own contracts, and cited *Angell & Ames on Cor.* 131; *California State Telegraph Company v. Alta Telegraph Company*, 22 Cal. 429; *Parish v. Wheeler*, 22 N. Y. 494; and *Baird v. Bark Washington*, 11 Sergt. & R. 411. They also contended that a single stockholder could not enjoin the proceedings of a corporation or its officers, except where the acts complained of were beyond the corporate power, and cited 18 How. 336, and *Zabriskie v. Cleveland, Col. & Cin. R. R. Co.* 23 How. 381.

Edward F. Head, for Respondents, made the point that if the powers of the Board of Trustees was circumscribed by by-laws they had no power to bind the principal beyond it, and cited *Angell & Ames on Cor.*, 2 Ed. 242; *Wyman v. Hall et al.*, 17 Mass. 29. He also contended that the question whether the corporation was bound to pay the debt could not be considered on this motion. He also argued that the by-law was not directory merely, and cited *Wallace v. City of San José*, ante, 180; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Foster v. Essex Bank*, 17 Id. 479; and *White v. Westport Manufacturing Company*, 1 Pick. 115.

By the Court, CURREY, C. J.

The Triunfo Gold and Silver Mining Company is a corporation organized under the laws of this State for the purpose of carrying on the business of mining in Lower California. Its principal office has been, since its organization, in the City and County of San Francisco. The plaintiffs were, at the time this action was commenced, stockholders and members

of said company, and the defendants named in the complaint were stockholders and members of the company on the first Monday of May, 1864, and were on that day elected trustees thereof, and the same trustees were in office at the time this action was commenced.

For the purpose of carrying on the business of the corporation in Lower California, the trustees appointed an agent or Superintendent, under whose management the company had become indebted on the 6th of July, 1865, in a sum exceeding thirty-five thousand dollars, at which date the trustees levied an assessment of three dollars per share on the assessable stock of the company, amounting in the aggregate to the sum of fifteen thousand six hundred and forty-two dollars, for the purpose of paying the necessary mining expenses of the company. The greater portion of the indebtedness incurred under the management of the Superintendent seems to have been without the knowledge of the trustees and without their direct consent, and was a matter of surprise to them when they discovered the extent to which the company had become involved. This indebtedness was incurred for labor, materials and supplies furnished to the company at its mine and mill in Lower California, and consisted of debts or claims which were valid and were liens by the laws of Mexico on the mine and mill of the company.

At the time of levying the assessment of three dollars per share against the assessable stock of the company, the plaintiff Sullivan owned six hundred and thirty shares, and the plaintiff Ryan one hundred shares of the assessable stock of the company. They refused to pay the assessment or tax imposed upon their stock, and in due time the trustees advertised the same to be sold at public auction in the mode provided by the statute for the purpose of making thereby the sums of the respective assessments. Whereupon the plaintiffs commenced this action to restrain the trustees from selling their stock, and from further increasing the debts of the company, and praying that the said assessment might be declared illegal and void. The Court granted an injunction restraining the trustees from

selling the plaintiffs' shares of stock. The trustees filed a verified answer to the complaint and then moved, on the pleadings and affidavits, for a dissolution of the injunction, which motion was denied, and from this decision of the Court the trustees have appealed.

The by-laws of the company are set forth in the plaintiffs' complaint, from which it appears that the corporate powers of the company were vested in seven trustees, who were to remain in office for one year from the date of their election and until their successors might be chosen. The Sixth Article of the by-laws, among other things, provides that the trustees shall have power to incur such indebtedness as they may deem necessary, not exceeding ten thousand dollars; and the Seventh Article declares it to be the duty of the trustees to make all assessments necessary, and collect the same in manner and form prescribed by the laws of the State of California and the by-laws of the company.

If it be assumed that by the Sixth Article of the by-laws the trustees had no authority to incur a debt exceeding ten thousand dollars, it does not result therefrom that they had not the authority to levy and collect, for the purpose of paying the legal and proper expenses of the company, assessments upon the capital stock thereof, even though the amount to be raised by such means might exceed ten thousand dollars. The trustees of any corporation formed under the general laws of this State had the power, when the assessment in this case was levied, to levy and collect, for the purpose of paying such expenses, assessments upon the capital stock of the corporation not to exceed five per cent of such capital stock, provided no previous assessment then remained unpaid or uncollected. (Laws 1864, p. 402.) It does not appear from the complaint or answer, or by the affidavits submitted on the motion to dissolve the injunction, that any previous assessment then remained unpaid or uncollected, and it is not to be presumed for the plaintiffs that such was the fact.

It is unnecessary to decide whether it was the duty of the trustees to provide for the payment of the debts incurred under

Points decided.

the management of the Superintendent at the mine, because the case presented does not involve that question, but only involves the power of the trustees to levy and collect the assessment sought in this case to be annulled as illegal and void. For aught that appears the trustees had the power to do what they had done and what they were attempting to do at the time this action was commenced in respect to levying and collecting the assessment in question.

The order refusing to dissolve the injunction is reversed, and the Court below is advised to dissolve the injunction granted.

PAUL J. GIFFORD v. ORRIN S. CARVILL.

REPRESENTATIONS AS TO VALUE OF MINING STOCK.—The value and richness of a mine belonging to a corporation, and its convenience to wood and water, are not mere matters of opinion or information, as to which the purchaser of stock from a stockholder has no right to rely upon the representations of the seller.

EVIDENCE OF FRAUD IN SALE OF MINING STOCK.—Fraudulent representations as to the value of the mine of a corporation, made by the seller of the stock of the company to the purchaser, as an inducement for the purchaser to buy, may be given in evidence, under a proper state of the pleadings, to defeat the collection of a promissory note given for the stock.

FRAUDULENT REPRESENTATIONS OF SELLER OF A CHATTEL.—A party cannot resist the payment of a promissory note, given in payment for property, on the ground of fraudulent representations, unless within a reasonable time after the discovery of the fraud he offers to return the property and rescind the contract, provided the property sold is of any value to either party.

CHATTEL OF NO VALUE NOT SUBJECT OF CONTRACT.—If a chattel be of no value to any one, it cannot be the basis of a contract, but if it be of any value to either party, it may be a good consideration for a promise.

FRAUDULENT REPRESENTATIONS IN SALE OF MINING STOCK.—Where the purchaser is induced by the fraudulent representations of the seller to make a purchase of mining stock, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract, and resist the payment of the note given for the property.

VALUE OF MINING STOCK.—A finding of fact that a mine owned by a corporation is valueless does not necessarily show that the stock of the corporation is valueless.

PRESUMPTION AS TO FINDINGS OF COURT.—Where there is no issue tendered in the pleadings upon a material matter, the Court or jury will not be presumed to have found on such matter.

DEFENSE THAT A NOTE WAS OBTAINED BY FRAUDULENT REPRESENTATIONS.—If a defendant would resist the payment of a promissory note, given for mining stock, on the ground that the seller made fraudulent representations

Argument for Appellant.

as to the value of the mine, the answer should set up the defense, and aver either that the stock was valueless to either party, or that the defendant had offered to return it and rescind the contract.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The notes in suit were given in part payment for twenty-five shares of the stock of the Amargoza Mining Company, situated in the southern part of California. The defendant had never visited the mine, and the purchase was made in San Francisco.

On the trial, the defendant introduced evidence tending to prove that the plaintiff, as an inducement for the defendant to purchase, told him he had just come from the mine, and that there were five hundred tons of ore out of the mine, which assayed as high as nine hundred dollars per ton, and that there was plenty of wood, lumber, and water near the mine to run a steam mill. The defendant also introduced evidence tending to prove that there was at the time only about twenty-five tons of ore out of the mine, which assayed only five dollars per ton, and that the mine was in a desert, with no wood or water near it, and was valueless, and had since been abandoned.

The defendant recovered judgment, and the plaintiff moved for a new trial, and assigned as one of his grounds that the evidence was insufficient to justify the verdict in this, that the matters sought to be proved were matters of opinion as to which the defendant had no right to rely on the statements of the plaintiff.

The Court denied a new trial, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellant, argued that the matters which the defendant sought to prove were: first — matters of opinion; or, second — of information, as to which the defendant had no right to rely upon the statements of the plaintiff, and cited Chitty on Contracts, 397, 398. They also insisted that the matter of the answer, if true in point of fact, constituted

no defense, because the defendant did not in fact rescind the contract, and cited *Conner v. Henderson*, 15 Mass. 319; *Kimball v. Cunningham*, 4 Id. 502; *Perley v. Balch*, 23 Pick. 283; *Hyatt v. Boyle*, 5 Gill & Johns. 121; *Taymen v. Mitchell*, 1 Maryland Ch. Decis. 496; *Marston v. Knight*, 29 Maine, 341; 2 Kent, 480, and notes; *Kane v. Johns*, 10 Watts, 109; *Voorhies v. Earl*, 2 Hill, 288; *Lightburn v. Cooper*, 1 Dana, 273; *Cany v. Graman*, 4 Hill, 626; *Thornton v. Wynn*, 12 Wheaton, 193; *Allen v. Anderson*, 3 Humph. 581; *West v. Cutting*, 19 Vermont, 536; *Grimaldi v. White*, 4 Esp. 95; *Barton v. Butters*, 7 East, 479; *Growning v. Mendham*, 1 Stark. 257; *Hopkins v. Appeltry*, 1 Id. 477; *Miller v. Tucker*, 1 C. & P. 15; *Percival v. Blake*, 2 Id. 514; *Cash v. Giles*, 3 Id. 407; *Fisher v. Samuda*, 1 Camp. 190; *Bowman v. Johnson*, 12 Wendall, 566; *Lander v. Taylor*, 5 Johns. 296.

Sharp & Lloyd, and *T. I. Bergen*, for Respondent, contended that under the facts of this case the purchaser had a right to rely on the representations of the seller, and if those representations were false it was a fraud, and a good defense; that it was not a case where the seller merely represented what he himself believed as to the value of the articles, and left the determination to the judgment of the buyer, and cited 2 Kent, 486; *Dogget v. Emerson*, 3 Story, 733; *Daniel v. Mitchell*, 1 Id. 172; *Small v. Atwood*, 1 Young, 407, 459; *Snow v. Denny*, 4 Metc. 161; *Buford v. Caldwell*, 3 Missouri, 477; *Thomas v. McCann*, 4 B. Monroe, 601; *Parham v. Randolph*, 4 How., Miss., 435; *Daniel v. Mitchell*, 1 Story C. C. R. 190; *Mason v. Crosby*, 1 Wood & M. 852, *et seq.*; *Farren v. Daniels*, Id. 100; *Foster v. Swasey*, 2 Id. 222; *Smith v. Babcock*, Id. 254; *Tutill v. Babcock*, Id. 299; *Shaeffer v. Slade*, 7 Blackf. 178; *Rench v. Sheldon*, 14 Barb. 66; *Hill v. Gray*, 1 Starkie, 434; and *Smith v. Richards*, 11 Pet. 71. They also contended that the Court might allow the defendant to return the stock even after the trial, and cited *Willis v. Bradley*, 1 Sandf. 560; *Ladd v. Moore*, 3 Id. 689; *Nichols v. Michael*, 23 N. S. 264; *Fraschieres v. Henriques*, 23 Barb. 270; *Pequeno v. Taylor*, 38 Id. 388; *Thurston v. Blanchard*, 1 Metc. 557.

By the Court, SAWYER, J.

This is an action upon two promissory notes given for a part of the purchase money for shares of stock in a mining company. The defense is, that the defendant was induced to purchase by the false and fraudulent representation of the plaintiff as to the value of the mines owned by the company issuing the stock. There is no averment in the answer, and no proof or finding of the Court, that defendant notified the plaintiff of his intention to rescind the contract on the ground of the fraud, or that he offered to return the stock. On the contrary, it appears that this defect was made one of the grounds for a new trial, and the Court required the defendant to deposit the stock with the Clerk for the benefit of the plaintiff as a condition of denying the motion.

We do not think the matters which the defendant sought to prove, as they are presented by the record, were mere matters of opinion or information, as to which the defendant had no right to rely upon the statements of the plaintiff. (*Smith v. Richards*, 13 Peters, 26; *Bennett v. Judson*, 21 N. Y. 239.)

Fraudulent sale of mining stock, and rescission of contract.

Appellant insists that, although the matters alleged and claimed to have been proved, might, if true, have justified the defendant in rescinding the contract and returning the stock, yet, until such rescinding and return, they constituted no defense to an action on the note; and such is the general rule upon the subject. In *Herrin v. Libbey*, 36 Maine, 357, the rule is expressed in the following language, viz: "The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, *within a reasonable time*, to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud." In *Burton v. Stewart*, 3 Wend. 239, the Court say: "Had they intended to treat the contract as void, on the ground of fraud, it was their duty, when they discovered that

the mare was not such as the plaintiff had represented her to be, to have returned her to the plaintiff. When prosecuted on the note, and the cause brought to trial, it was too late to repudiate the contract." (See, also, *Kimball v. Cunningham*, 4 Mass. 502; *Norton v. Young*, 3 Greenl. 32; *Campbell v. Fleming*, 1 Adolp. and Ellis, 40.) These authorities state the rule correctly in all cases where the property purchased is of the slightest value to anybody. When the article is absolutely valueless for any purpose, it is not necessary to return it. This is on the ground, that an article absolutely without any value is not the subject of a contract—that it cannot afford any consideration for a promise, and the contract is *nudum pactum*—absolutely void, *ab initio*, for want of a consideration to support it. But it is not enough that it shall be without value to the defendant. If it is, or *may be* of *any* value to *either* party, or if the detention would produce any loss or injury to the other party, the contract must be rescinded, and the property returned within a reasonable time after the discovery of the fraud. The editor of the last edition of Greenleaf's Reports, in a note to *Norton v. Young*, 3 Greenl. 33, thus states the rule and cites a number of authorities to sustain it. In *Conner v. Henderson*, 15 Mass. 321, the property sold consisted of a number of casks of lime—the lime proving to be worthless. The Court say (p. 322): "Although the principal subject of the contract, in the present case, may be presumed, from the evidence reported, to have been absolutely of no value, and so the returning of it would have been but an idle act, yet the casks were of some value and should have been restored, if the plaintiff would treat the sale as a nullity, and demand his money as paid without consideration." So also in *Perley v. Balch*, 23 Pick. 285, the Court say: "Where the purchaser is induced, by the fraudulent misrepresentations of the seller, to make the purchase, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract and recover back the consideration paid, or, if he has given a note, resist the payment

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of it. Here was no return of the property purchased; but if that property was of no value, whether there was any fraud or not, the note would be *nudum pactum*. The defendant's counsel, not controverting the general rule, objects to the qualification of it. He says that the ox, though valueless to the defendant, might be of value to the plaintiff, and so the defendant would be bound by his contract, although he acquired nothing by it. But a damage to the promisee is as good a consideration as a benefit to the promisor. If a chattel be of no value to any one, it cannot be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss. But it is apparent that a want of consideration was not the principal ground of defense. The defendant mainly relied upon fraud or a warranty. And to render either available to avoid the note it was indispensable that the property should be returned. He cannot rescind the contract and yet retain any portion of the consideration. The only exception is where the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified *in toto*, or not at all. It cannot be enforced in part and rescinded in part. And if the property would be of any benefit to the seller, he is equally bound to return it. He who would rescind a contract must put the other party in as good a situation as he was before, otherwise he cannot do it. Chitty on Con. 276; *Hunt v. Silk*, 5 East. 449; *Conner v. Henderson*, 5 Mass. 314." (See also *Shepherd v. Temple*, 3 N. H. 457; *Carter v. Walker*, 2 Rich. 40; *Christy v. Cummins*, 3 McLean, 386; Chitty on Con., pages 402, 636, 665, and notes.) Thus it will be seen that the safe course to pursue for a party who has been induced by fraudulent representations to make a purchase which he otherwise would not have done, is, when the

fraud is discovered, to at once repudiate the contract and return the things purchased.

Return of property after trial is not in time to obtain rescission of contract.

If it was necessary to rescind the contract and return the property in this case, a surrender of the stock to be delivered to the plaintiff made after verdict and judgment, upon requirement of the Court as a condition of denying a new trial, was not in time. The cases cited by respondent on this point are of a different class and not applicable, or, strictly speaking, are not within the rule. They are cases where a party, upon fraudulent representation as to his pecuniary condition, has induced other parties to sell him goods on credit, giving his own note therefor. The vendor in such cases, upon discovering the fraud, may bring trover or replevin without first surrendering the note. But he must be prepared to surrender it on the trial. Of course, in that class of cases no loss can result to the defendant from retaining his own note till the trial. But where the vendee gives the note of a third party upon a fraudulent representation as to the responsibility of the maker, the vendor must return the note to the vendee before suing, for the delay may result in injury to the vendee. This distinction is stated and authorities referred to in the note before cited. (3 Greenl. 33, note.)

To apply these principles to the present case. There is no averment in the answer, and no evidence, that defendant rescinded the contract and returned, or made a tender of the stock, and no averment that it was of no value, unless the averment that it was "of little or no value" can be so construed. If it was not absolutely without value to either party—if it had a little value—there was a consideration which, being actually retained, did not afterward fail, and it was necessary to rescind the contract and return the consideration within a reasonable time after the discovery of the fraud. We are inclined to think the allegation cannot be regarded as an averment that there was no value. It must be

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construed most strongly against the pleader, and the implication is that it might have been of some, though little, value. At all events, the answer does not squarely negative the idea that the stock was of some value.

It is true that the Court, upon the evidence, (which, however, was admitted under objection that it was inadmissible under the pleadings,) found that the *mine* of the company "was of no value whatever," but there is no finding as to whether the "*shares of mining stock* in the Amargoza Mining Company," which formed the consideration of the note, were valueless or otherwise. The value of the mine referred to may have been the main inducement to purchase, and the defendant may have been entitled to rescind the contract in consequence of fraudulent representations in regard to its value, yet it by no means follows that the stock of the company owning the mine was utterly valueless because *that particular mine* was so. And the burden of alleging and showing that the stock was valueless rested on the defendant. The company may, for aught that appears to the contrary, have had other property, or a paid up capital sufficient to have still made the stock of some value. As there was no averment that the stock had no value, there was strictly no issue tendered on that point, and although there is no exception for want of a finding, the Court cannot be presumed to have found on such issue. The cause appears to us to have been somewhat loosely tried on both sides, and not with a clear view of the distinction made by the authorities before cited between those cases that require a rescission of the contract and return of the articles purchased, and those which do not. But on the motion for a new trial the necessity of rescinding the contract and returning the stock was distinctly urged, and the Court was evidently strongly impressed with the soundness of this view. The learned Judge, in deciding the motion, observes: "The plaintiff, with considerable force, says that the defendant should not avoid payment of the notes and retain the stock. Although the stock is valueless *to the defendant*, and never had any value, yet the plaintiff has a right to the pos-

session of it, and a new trial will be granted unless the defendant deliver to the Clerk of this Court, for the plaintiff, said stock or equivalent shares of said stock within five days, whereupon the motion for a new trial will be denied." A fact which does not distinctly appear in the finding, or to be within the issues tried, is here assumed, viz: that "the stock is valueless to the defendant, and never had any value." But the Court, nevertheless, seems to be of the opinion that it might be of value to the plaintiff, and that it must still, even after verdict and judgment, be returned, or a new trial had. We have seen, if it was absolutely of no value at all, there was no necessity for returning it; but if it was of some value, and on that ground it was necessary for the defendant to return it, then it was too late, after verdict and judgment, to offer it for the first time, on the requirement of the Court as a condition of denying a new trial. We think upon the whole, that a new trial should be had in order that the questions upon which the rights of the parties depend may be directly put in issue, tried and determined in view of the law as herein indicated.

Judgment and order denying a new trial reversed, and a new trial granted, with leave to the parties to amend their pleadings as they may be advised.

L. D. WAKEFIELD v. M. GREENHOOD.

COMPLAINT ON PROMISE TO PAY DEBT OF ANOTHER.—In an action brought upon a promise of the defendant to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing.

COMPLAINT ON PROMISE TO ACCEPT A DRAFT.—In an action brought upon a promise made by the defendant to accept a draft which another might draw on him, it is not necessary to aver in the complaint that the promise was in writing.

PROMISE TO PAY DRAFT WHEN DRAWN.—A promise that a drawee will pay a draft which may be drawn on him, is a promise to accept the draft when drawn, and if the drawee refuse to pay the draft when drawn, he may be sued as acceptor.

A PROMISE TO PAY A DRAFT MUST BE IN WRITING.—A promise to pay a draft that may be drawn on the promisor by another person for a debt due by the drawer to the person to whom the promise was made, is void, unless in writing and signed by the person making the promise.

Opinion of the Court — Rhodes, J.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

Plaintiff recovered judgment, and defendant appealed.

The other facts are stated in the opinion of the Court.

Moore & Alexander, for Appellant, contended that the demurrer should have been sustained for the reason that the complaint did not aver that Greenwood's promise was in writing, because our statute relating to bills of exchange provides that "no person within this State shall be charged as an acceptor on a bill of exchange, *unless his acceptance shall be in writing, signed by himself or his lawful agent,*" and that "an unconditional promise *in writing*, to accept a bill before it is drawn, shall be deemed an acceptance," etc., and cited Wood's Digest, p. 72, Secs. 6 and 8. They also insisted that the demurrer should have been sustained for the further reason that the complaint averred that the indebtedness for which the draft was drawn was the debt of Bar. They also contended that the judgment was erroneous, because no promise in writing signed by defendant was proved.

Henry H. Hartley, for Respondent, argued that the promise of the defendant was not within the Statute of Frauds, and that the defendant's promise to pay was not on a contingency, but was a direct promise to pay for the transportation of the goods, and that Bar acted as the mere agent of the defendant in adjusting the account, and that defendant's liability was not on the order, but for failing to pay the amount agreed on, and cited *Wainwright v. Starr*, 15 Ver. 215; *Darkham v. Marrow*, 2 Comstock, 533; *De Wolf v. Ratand*, 1 Pet. 476, and *Townsend v. Sumral*, 2 Pet. 170.

By the Court, RHODES, J.

The contract upon which this action was brought, as stated in the complaint, is substantially that the defendant, a forwarding and commission merchant at Sacramento, engaged

the plaintiff, a teamster, to transport certain goods of one A. Bar, from Sacramento to Austin, in the then Territory of Nevada, and deliver the same to said Bar, and in consideration of the plaintiff's delivering said goods as aforesaid, the defendant promised to pay the plaintiff, upon presentation, any order or draft that said Bar might draw on the defendant, for the transportation of the goods.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and for cause he specifies in argument, among other things, that it does not state that the defendant promised in writing to accept the bill or order mentioned in the complaint; and that it does not state that the agreement of the defendant or some note or memorandum thereof to answer for the default of said Bar, was in writing subscribed by the defendant.

Complaint need not aver contract to pay debt of another to be in writing.

If the action is to be regarded as brought upon the promise of the defendant to answer for the default of Bar, the demurrer was properly overruled. At common law it was unusual and unnecessary to allege that the contract, for the breach of which the action was brought, was entered into in writing. After the passage of the Statute of Frauds, the rule was, as stated in 1 Chit. Plea. 270, "Where the contract must have been in writing under the Statute of Frauds, yet it is not necessary in the declaration to show that fact, though it is said to be otherwise in a plea." The authorities in support of this doctrine are very numerous, among which may be cited: *Miller v. Drake*, 1 Caine, 45; *Nelson v. Dubois*, 13 John. 177; *Elting v. Vanderlyn*, 4 John. 237; *Gibbs v. Nash*, 4 Barb. 449; *Martin v. McFadin*, 4 Litt. 240; *McDowel v. Delap*, 2 A. K. Marsh. 33. The rule in equity was the same as at law. (See *Spurrie v. Fitzgerald*, 6 Ves. 548; *Cozine v. Graham*, 2 Paige, 177; *Cowles v. Bowne*, 10 Paige, 526; *Champlin v. Parrish*, 11 Paige, 405.) If the contract stated

in the declaration or bill in equity was denied, it was incumbent on the plaintiff or complainant to prove by legal evidence its existence, and this could be done only by the production, or proof of the execution and contents, of the written agreement, or some note or memorandum thereof, executed according to the provisions of the Statute of Frauds.

The language of section twelve of the Statute of Frauds of this State, (Wood's Dig. 106,) respecting a special promise to answer for the debt, default or miscarriage of another, differs somewhat from that found in the statute of the 29th Car. 2d, Cap. 3, but it is identical with that of New York, which is considered to have the same meaning as the English statute, and in that State, as we have seen, the form of pleading is held not to have been changed by the statute. No authority is cited by the defendant in support of the proposition assumed by him, that it is requisite to allege an agreement in writing; nor is any reason suggested, or provision of the Practice Act mentioned, requiring the contract to be stated in any manner differing from that which was regarded as sufficient at common law.

Acceptance of bill of exchange.

The demurrer was also properly overruled, regarding the action as brought upon the promise of the defendant to pay the order or bill of exchange that might be drawn upon him by Bar. What has already been said upon the form of pleading is equally applicable to the case considered on the theory last suggested. In an action by the payee or indorsee of a bill against the acceptor, it was not necessary to aver that he accepted the bill *in writing*. (2 Chit. Plea. 149.) The promise by the drawee to pay the bill is, by necessary intendment, a promise to accept, just as the payment by him implies and includes, at the same time, the acceptance of the bill. In *Wynne v. Raikes*, 5 East. 514, which was an action brought against the drawees to charge them as acceptors of the bill, the acceptance was found in their letter, in which they said: "We shall accept or certainly pay, all the bills," etc. Lord

Ellenborough said that a promise to pay is an acceptance. And so, in this case, the promise to pay, if so made as to bind the defendant, is to be deemed a promise to accept the bill. In an action on the bill against the drawee who has promised to accept, he is sued as the acceptor, and the allegation in the complaint is, that the defendant accepted the bill. Such was the nature of the action and the form of the pleadings in *Coolidge v. Payson*, 2 Wheat. 66, which has been regarded in the United States as a leading case in respect to the liability of the drawee upon his promise to accept. (See also *Greele v. Parker*, 5 Wend. 414; *Parker v. Greele*, 2 Wend. 545; *Wilson v. Clements*, 3 Mass. 1.) In *Clark v. Cook*, 4 East., Lord Ellenborough, in delivering the opinion of the Court, said: "And it has been laid down in so many cases that a promise that a bill when due shall meet due honor amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to the books on this subject." The eighth section of the statute of 1850 of this State, relative to bills of exchange and promissory notes, provides that "an unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of any person who, upon the faith thereof, shall have received the bill for a valuable consideration." It thus appears that the drawee, under such circumstances, is liable to the payee or indorsee, and should be sued as the acceptor of the bill; and no reason is suggested why the allegation as to the acceptance should differ from that which is held to be sufficient in a case where the acceptance is indorsed on the bill.

The defendant states in his motion several grounds upon which he relies for a new trial, which are that the Court erred in holding and deciding certain matters of fact and conclusions of law; but as the record presents no evidence, except what may be inferentially gathered from the judgment, that such decisions were made, no notice can be taken of them.

The last ground is: "Ninth — Said judgment is contrary to

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the evidence and is not sustained by the evidence in this: The testimony showed that the plaintiff relied upon and looked to Bar to pay his debt, and had a settlement with and received part payment from Bar, and accepted Bar's check or obligation for the balance. The judgment is not sustained by the evidence for the further reason that it was not shown that the defendant ever promised in writing to pay this claim, and that any promise made by him was a verbal one to pay the debt of another, and no consideration was shown for such promise."

For the proper solution of the question involved in this ground it will be necessary to determine the character of the agreement, upon which the action is brought, and to ascertain from the complaint whether the defendant's promise was an original and direct promise on his part, to pay for the transportation of the goods, or whether it was only collateral to some liability thereafter to be incurred by Bar to the plaintiff. After the statement of the contract, already mentioned, it is averred in the complaint that the defendant delivered the goods to the plaintiff; that the plaintiff transported them to Austin and delivered them to Bar; that thereupon the plaintiff and Bar "had an accounting for the transporting and freighting of the goods, wares and merchandise aforesaid, and there was then found due from said Bar to plaintiff on account thereof the sum of one thousand dollars; that Bar then drew his order or draft on the defendant, requesting him to pay the plaintiff that sum, and charge the same to his (Bar's) account, and delivered the same to the plaintiff," who, "in consideration of the defendant's said promise and agreement to pay the same, accepted and received the said order or draft from the said A. Bar in payment of the said sum of one thousand dollars, due to him as aforesaid from the said A. Bar for freight and transportation of said goods, wares and merchandise;" that he presented said order or draft to the defendant and demanded payment, but the defendant refused and still refuses to pay said sum of money or any part thereof; that neither said defendant nor said Bar have paid said sum; and that the plain-

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tiff is the "owner and holder of said indebtedness and entitled to receive the amount due thereon from the defendant."

It thus clearly appears that the agreement upon which the action was brought, was the agreement of the defendant to pay the order or draft of Bar. There is no allegation that the defendant promised to pay for the transportation of the goods, or was to become liable therefor in any event, nor that the transportation at any specified price, or at a reasonable price, amounted to any sum of money; but the promise was to pay such order or draft as Bar might draw on him on account of the transportation. His liability upon his promise did not begin until Bar had drawn his order, and it was contingent upon its being drawn. If an order had not been drawn by Bar, it could not be claimed that the defendant would be liable on his contract, as it is stated in the complaint; and when the order was drawn that measured the extent of the defendant's responsibility, if he is responsible at all.

There is no question that it is competent for the forwarder to contract for the transportation of goods, and assume a direct liability for the cost of transportation, and that the parties to the contract may agree — as the plaintiff contends they have done in this case — that the sum determined upon by the person performing the service and the person to whom the goods are to be delivered, shall be the charges for transportation, and that the amount of the charges so agreed upon may be evidenced by an order drawn by the owner of the goods upon the forwarder, as well as by any other means the parties may agree upon. But such an agreement is essentially different from the one set up in the complaint.

It is said that the credit was given to the defendant and that it was not intended that Bar should be liable to the plaintiff — the order operating between the plaintiff and defendant merely as the measure of the defendant's liability; the answer is that the complaint states that Bar became indebted to the plaintiff for transporting the goods, and delivered the order in question to the plaintiff for the purpose of satisfying his debt to the plaintiff; and it would be difficult to under-

stand how Bar could become indebted to the plaintiff for services performed by the plaintiff at the request of the defendant, and in consideration of his direct promise to pay the plaintiff for such services. And it may again be added that the defendant did not obligate himself to pay for the transportation of the goods, but he promised to pay any order or draft that Bar might draw on him, on the account, as we understand from the several allegations of the complaint, of his (Bar's) indebtedness accruing to the plaintiff for transporting the goods.

The construction we have given to the contract as stated in the complaint is fully sustained by the plaintiff's evidence. On cross examination of the plaintiff this question was asked: "The only agreement that was made between you and Greenhood in reference to the payment of anything, was that he would accept and pay any draft that Bar might draw upon him or the San Francisco house for this freight?" And his answer was, "Upon him or the San Francisco house he would pay the draft or check." Another witness states that the defendant said "we could collect whatever was convenient for them to pay, and to accept an order on him or Levi Brothers, in San Francisco, and he would pay the same on either when we returned." The testimony of another witness was to the same effect. It also appears from the evidence that the transportation amounted to about seventeen hundred dollars, and that at the time of the delivery of the goods Bar paid the plaintiff between six hundred dollars and seven hundred dollars of that amount, and that the plaintiff settled with Bar respecting the transportation and certain damages growing out of the transportation, and that he never made any settlement with the defendant.

If the construction we have given to the complaint is the correct one—that the promise of the defendant was that he would pay any order or draft that Bar might draw on him for the transportation of the goods, and that such payment was to be made on the account of Bar—neither argument nor authority is required to prove that the plaintiff cannot recover

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unless he makes it appear that the promise was reduced to writing and signed by the defendant. No promise in writing to pay the order was offered in evidence, or appears to have been made, and we therefore hold that the Court below erred in refusing the new trial.

Judgment reversed and the cause remanded for a new trial.

SAWYER, J., dissenting.

I think the contract sued on was defendant's own contract, and not a promise to answer for the debt, default or miscarriage of another. I am, therefore, compelled to dissent.

E. J. SCHELLHOUS v. J. C. BALL.

NEW TRIAL ON GROUND OF SURPRISE.—A new trial on the ground of surprise should not be granted unless it clearly appears that the verdict is mainly attributable to the facts out of which the surprise resulted, and that the surprise has not resulted from the fault or negligence of the moving party.

SAME.—If the party claiming to have been surprised can relieve himself, either by a nonsuit, a continuance, or the introduction of other testimony, or in any other way, and fails to do so, a new trial will not be granted.

SAME.—If, during the argument of a case to the jury, a dispute arises between counsel as to whether a certain paper was introduced in evidence, and the Court decides it was, the party claiming to be surprised by the decision should apply to the Court at once for leave to introduce rebutting testimony, if he has such testimony, and if he fails to do so a new trial will not be granted.

SURPRISE DURING A TRIAL.—When, during the progress of a trial, conditions are found to exist which may amount to legal surprise, the Court should, if an application is made therefor, grant relief at once, if the facts are such as would justify the Court in setting aside the verdict after the trial.

EVIDENCE OF SURPRISE DURING A TRIAL.—The party alleging surprise during the progress of a trial should show it by the best evidence within his reach.

SAME.—If, during a trial, facts exist which amount to legal surprise, these facts should be shown by the affidavit of the attorney, and not of his client.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The plaintiff averred in his complaint that on the 20th of May, 1864, he sold defendant a tract of land for the sum of fourteen hundred dollars, and that seven hundred dollars of the

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purchase money was due and unpaid. Plaintiff prayed for judgment for seven hundred dollars, and that the same be made a lien on the land.

Defendant, in his answer, denied that the money had not been paid, but averred that in June, 1864, the plaintiff gave his wife, Catharine T. Schellhous, an order on defendant for the money, and that the order was presented by her to him and paid.

Plaintiff was a witness in his own behalf to show that the money had not been paid. On his cross examination he stated that he had given his wife a written order, in June, 1864, directing defendant to pay her the money. The order was produced and offered in evidence, with his wife's receipt on the back of it for the money, dated July 16th, 1864.

Plaintiff called as a witness O. C. Lewis, who testified that July 16th, 1864, he saw plaintiff's wife and defendant at Folsom, and that Mrs. Schellhous showed him one hundred dollars, in gold coin, and a note of that date for one hundred dollars, payable to her, signed by defendant. The note was produced and shown to the witness. Defendant offered evidence to prove that on the 16th day of July, 1864, he paid plaintiff's wife the seven hundred dollars in greenbacks, at Folsom.

During the argument of the case, plaintiff's counsel commented on the one hundred dollar note, to which defendant's counsel objected, claiming that it was not in evidence. The Court decided that it was offered in evidence. The jury found a verdict for plaintiff. Defendant moved for a new trial, and offered the affidavit of defendant to show that he was taken by surprise by the decision of the Court, and that if he had supposed the note was in evidence, he could have procured testimony to show that this note was not a part of the transactions concerning the payment for the land, but was a separate business transaction.

Defendant appealed from an order denying a new trial.

The other facts are stated in the opinion of the Court.

Jo. Hamilton, for Appellant, on the question of surprise, cited the following authorities: Accident or surprise is ground for new trial. (Practice Act, Sec. 1, 193; *Craig v. Fanning*, 6 Howard P. R. 336; *Wardell v. Hughes*, 3 Wendell, 418; *Utica Insurance Company v. Badger*, Id. 102; *Burbon v. Covey*, 11 Id. 83; *Herford v. Archer*, 4 Hill, 211.)

Tweed & Craig, for Respondent, argued that the attorney who tried the cause should have made the affidavit in relation to surprise, as he would be the person who would be most likely to know whether the note had been offered in evidence, and whether any legal surprise had resulted from the decision of the Court that it was in evidence. They argued further, that defendant's attorney had full opportunity to examine the witness, Lewis, concerning the note, and that he did not do so was the result of his own inattention.

By the Court, SANDERSON, J.

A new trial is sought upon the following grounds:

1. Insufficiency of the evidence;
2. Surprise; and
3. Error in law.

I. The real point in controversy, and substantially the only point litigated, was whether the money sued for had been paid by the defendant to the plaintiff's wife pursuant to the plaintiff's direction; and upon that question the testimony was conflicting, which is a sufficient answer to the first ground of the motion.

II. To entitle a party to a new trial on the ground of surprise the same must be conclusively shown by the affidavits; and moreover it must appear that the fact or facts from which the surprise resulted had a material bearing upon the case, and that the verdict may be mainly attributed to their effect. (*Hartwright v. Badham*, 11 Price, 383.) Upon this ground new trials should be granted with great caution, for in many cases it is used as a pretext and a cover for carelessness and

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inattention rather than as a meritorious ground for relief. A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence, and must in addition claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by a nonsuit or a continuance, or the introduction of other testimony or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief.

In the present case a dispute arose between counsel, pending the argument of the case to the jury, as to whether a certain promissory note which had been handed to a certain witness and concerning which the witness had testified, as both admit, was in fact introduced in evidence. Thereupon the presiding Judge was called upon to determine the disputed fact, who decided that the note had been offered in evidence. If this decision was legal surprise and counsel could, as he claims, have shown by competent testimony that the note had in fact no application to the case but was a part of a different transaction, he should then and there have applied to the Court, on the ground of his surprise, for leave to introduce his testimony. It was not too late, in the discretion of the Court, for him to do so, and doubtless, if satisfied that the allegation of surprise was made in good faith, the Court would have permitted it, and there is no pretense that his testimony was not at hand. When during the progress of a trial conditions are found to exist which may amount to legal surprise, it is better for the purposes of justice and the convenience of Courts and litigants to afford relief at once and on the spot, if it can be done; and in the exercise of that sound discretion which the law recognizes as vested in Judges they should not refuse such relief, if attainable under the circumstances, and it is not to be presumed that they will. This discretion however should be exercised with great care and only in cases where the Court is satisfied that the surprise has not resulted from carelessness, for its exercise in such a case would be demoralizing and tend to a relaxation of that vigi-

lance on the part of counsel which the due and orderly conduct of a trial renders indispensable. What we mean to say is that the relief should be granted on motion at the trial, if practicable, when it would be granted on motion after the trial, and not otherwise.

Suppose in the present case the Judge had decided the dispute against the plaintiff. He would have been bound to ask leave to introduce the note then and there, and if denied take a nonsuit, and would not have been allowed to take his chances for a verdict, and if against him claim a new trial. (*Live Yankee Company v. Oregon Company*, 7 Cal. 40; *Turner v. Morrison*, 11 Cal. 21.) This rule, when applicable and so far as applicable, is no less obligatory upon the defendant.

As already intimated, it is the duty of the Courts to look upon applications for new trials upon the ground of surprise with suspicion, for the reason that from the nature of the case surprise may be often feigned and pretended, and the opposite party be unable to show that such is the case. Hence the party alleging surprise should be required to show it conclusively and by the most satisfactory evidence within his reach. Upon the question whether the note was in fact offered in evidence the defendant presents several affidavits; but upon the question of surprise — upon the question whether, in consequence of the supposed failure of the plaintiff to formally offer the note — the defendant was misled to his prejudice, which is the important and material question, only the affidavit of the defendant is offered. If anybody was deceived or misled it was the attorney of the defendant who managed the case and not the defendant. If the attorney was misled the fact must necessarily be better known to him than defendant, if not known to him only, which last is the most reasonable supposition. In view therefore of the rule requiring the most satisfactory evidence within reach, the affidavit should have been made by the attorney and not the client. The party who must necessarily know the least about them is made to swear to the facts, while he who must necessarily know the truth

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of the whole matter swears not at all, which fact may have tended not a little to cast doubt upon the *bona fides* of the motion in the judgment of the Court below, and relieves us of any doubts which might have existed otherwise as to the soundness of its decision.

III. The testimony of Spooner and the two Franks and the contract between the plaintiff and defendant was properly excluded in view of the issue, to which they appear to have been wholly irrelevant. The only issue about which there was any real contest was as to whether the defendant had paid the money to the plaintiff's wife. The defendant did not pretend that the money was not due under the contract, but that it had been paid.

Order affirmed.

J. E. HENRY v. GEORGE L. EVERTS.

EVIDENCE TO SHOW SALE FRAUDULENT.—The fact that the purchaser of a mining claim, after his purchase, takes a large amount of gold dust out of the same, is not admissible in evidence for the purpose of proving that the sale was fraudulent as to the creditors of the vendor by reason of inadequacy of the price paid.

EVIDENCE AS TO VALUE OF PROPERTY.—In ascertaining whether an adequate price was paid for a piece of property at the time of its sale, the evidence should be restricted to the question of what its market value was at that time.

RESTRICTION OF OPERATION OF EVIDENCE.—If a party introducing evidence during the progress of a trial announces the purpose for which it is introduced, the evidence will be restricted to the purpose announced.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

On the 3d day of March, 1862, P. Everts sold to George L. Everts, the defendant, three tracts of mining claims, called the Last Chance claims, the Keystone claims, and the Buchanan claims. July 31st, 1862, the plaintiff recovered a judgment against P. Everts in the District Court, upon which he afterwards issued an execution and sold the claims, and became the purchaser at the Sheriff's sale, and no redemption being made, afterwards obtained a Sheriff's deed. He then brought the present action to recover possession of the claims, and

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sought to prove on the trial that the sale from P. Everts to George L. Everts was fraudulent.

For the purpose of showing that the sale was fraudulent, plaintiff relied in part on the alleged inadequacy of the price paid.

Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Chas. A. Tuttle, for Appellant.

Jo: Hamilton, for Respondent.

By the Court, RHODES, J.

It appears from the statement on motion for new trial, that the plaintiff, for the alleged purpose only of proving the value of the Last Chance claims, and the inadequacy of the price paid for those claims by the defendant at the sale by P. Everts, as evidenced by the deed of the 3d of March, 1862, proved by several witnesses that the defendant "after his said purchase, took out large sums of money in gold dust while mining said Last Chance claims, amounting to many thousand dollars over expenses."

In ascertaining whether the price paid for a parcel of property was adequate, the inquiry is what was the market value of the property at the time of sale. The market value may be, and often is, quite different from the real, the intrinsic value. In many instances the property may possess a value or be subject to a defect that neither the vendor nor purchaser can discover by the exercise of the greatest circumspection and diligence until after the property has for a long time been appropriated to the purposes for which it was purchased. This is peculiarly the case with a mine. Its real value at a given time is ascertainable only when the mine has been exhausted, and it is therefore impossible that the real value can aid in determining the market value.

The only service that evidence showing the inadequacy of

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the price paid for the claims by the defendant would perform, in an attack upon the sale by the plaintiff as a creditor of the defendant's vendor on the ground of fraud, would consist in its tendency to show the *scienter* of the defendant, at the time of his purchase; for if the price paid was far below the true value, and that fact was unknown to the defendant, he is not chargeable on that ground with the consequences of the fraudulent acts of his vendor in making the sale in fraud of his creditors. It requires no argument to prove that evidence showing the amount of gold extracted from the mine subsequent to the sale does not tend to prove knowledge by the purchaser of the real value of the mine.

The error in admitting such testimony was not rendered immaterial or productive of no injury to the defendant, by the introduction in evidence of the judgment roll in the case of *Henry v. P. Everts and G. L. Everts*, in which the vendor's lien upon the undivided half of the Keystone claim was enforced, and the sale by P. Everts to G. L. Everts was held fraudulent and void as against the plaintiff, for the plaintiff offered it in evidence as appears from the statement "only as foundation for plaintiff's title papers introduced in evidence as hereinafter specified, to wit: execution of Sheriff's (Gooding) and Bullock's deeds." The operation of the evidence was restricted to the purpose announced when the judgment roll was offered and admitted.

Judgment reversed and the case remanded for a new trial.

JOHN McQUADE v. ANNA ELOISE WHALEY *et als.*

COPY OF PLEADINGS IN TRANSCRIPT.— If the Court below denies a new trial on the ground that the evidence is insufficient to sustain the cause of action alleged, and an appeal is taken from the order, the transcript must contain an authenticated copy of the pleadings, or an agreed statement of their contents.

STATEMENT OF ISSUES MADE BY THE PLEADINGS.— A statement of the contents of the pleadings made by appellant's counsel, and placed in the transcript, but not agreed to by the opposite attorney, or included in the settled statement, constitutes no part of the record.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

Plaintiff appealed.

The other facts are stated in the opinion of the Court.

John Satterlee, for Appellant.

Patterson, Wallace & Stow, for Respondents.

By the Court, SAWYER, J.

The appeal is from an order denying motion to set aside a nonsuit, and for a new trial. The transcript consists only of the settled statement on appeal, preceded by a brief, unauthenticated statement of the issues formed by the pleadings, but does not contain the pleadings themselves. When the cause was called for argument, the respondent, who had previously filed exceptions to the transcript in pursuance of Rule XIII, moved to dismiss the appeal, under section three hundred forty-six of the Practice Act, on the ground that the record does not contain the pleadings, which, it is contended, the appellant was required to furnish.

On appeal from an order, the appellant is required to furnish the Court with a copy of the "order appealed from and a copy of the papers used on the hearing of the Court below." On appeal from an order denying a new trial, on the ground that the evidence is insufficient to sustain the cause of action alleged, the Court, in considering the question, must necessarily refer to the issues formed by the pleadings, and the Court below must, also, have referred to the pleadings in determining the question. Without some knowledge of the issues, it would manifestly be impossible for this Court to intelligently review the action of the Court below. A new trial might be denied or granted upon grounds that would require no reference to the pleadings to enable the Court to determine the propriety of the ruling, as, for instance, in the case of misconduct of the jury in the determination of a case by a resort to chance.

But the transcript should always contain enough of the record of the Court below to fully present the question, and show the materiality of the point relied on to reverse the judgment or order; and generally, whenever a pleading or other paper has been necessarily used on the hearing in the Court below, a copy of the pleading or an agreed statement of the contents of so much, at least, as is relevant to the point in issue, should be furnished in the transcript. The brief note of the issues in the case preceding the statement in the transcript is undoubtedly sufficient to enable this Court to intelligently apply the evidence, and would answer all the purposes of the pleadings, had it been stipulated by counsel that it might take the place of the pleadings, or perhaps, if it had been made a part of the agreed statement, and had thereby received the sanction of the adverse counsel. We can perceive no objection to abbreviating transcripts in this mode by consent, care being always taken to include sufficient to fully present the points in controversy. But as it stands, it is the wholly unauthenticated statement of the issues made by the counsel on one side only, really constituting no part of the transcript, and might as well have been in the brief. If the respondent does not admit its correctness or sufficiency, we think he is entitled to have the pleadings in this case in the record. The counsel for appellant was not present when the cause was called for argument, and was not aware that exceptions had been filed. He had sent a note to the clerk directing his side to be submitted on briefs. The motion to dismiss was submitted with leave to file briefs, and having been called to the attention of appellant, he has filed his brief insisting upon the sufficiency of the transcript, but at the same time presenting an affidavit stating the foregoing facts with reference to his absence on the calling of the case, as an excuse for not asking leave to supply the pleadings at the time, and asking permission now to perfect the record. As the objection is technical, and as the statement of the issues, if true — and we do not understand that this is questioned — would be sufficient for all the purposes of the appeal,

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had it been substituted by stipulation, we think leave to supply the pleadings should be granted.

Order that appellant have leave within ten days to add certified copies of the pleadings to the transcript.

JAMES H. BOLTON v. ROBERT STEWART.

GRANTING A NEW TRIAL.—An order granting a new trial will not be reversed because the reason assigned for granting it is a bad one, provided there was a good reason for granting the same.

REVIEW OF ORDER GRANTING NEW TRIAL.—The appellate Court, in reviewing an order granting a new trial, is not confined to the reasons assigned by the Court below granting it.

NEW TRIAL.—Where the findings of the Court are not warranted by the evidence, a new trial should be granted.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

The facts are stated in the opinion of the Court.

Caleb Dorsey, for Appellant.

The Court granted a new trial on the supposition that the answer admitted plaintiff's right to a recovery of a portion of the premises. This is a mistake. The answer denies plaintiff's possession of or right to the possession of or ouster from any of the premises.

The counsel for plaintiff seems to think as the power of the Court below to grant new trials is one of legal discretion, the Court will not interfere, and cites a number of decisions. I admit that this is law; but in this case the error in granting the new trial was not the exercise of legal discretion. It was an error of law, arising out of the construction of the pleadings in the case; and in such a case this Court has decided that it will review on appeal errors of the Court below in granting new trials.

The language of the decision is as follows: "When the motion for a new trial is founded entirely upon alleged errors

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of law in the proceedings of the Court below, and the order for a new trial is granted, *this Court will review* such action of the Court as in other cases where questions of law and not matters of mere discretion are wanted." (*Brady v. O'Brien*, 23 Cal. 244.)

All the facts in this case are fully ascertained. It is only for this Court to pronounce the law, and to order the judgment to be entered up accordingly.

Coffroth & Spaulding, for Respondent.

The evidence shows plaintiff's prior right to the property. Counsel for defendant says that this Court can modify the judgment. We think not. This is an appeal from an order, and not from a judgment, and hence this Court cannot modify the judgment. And besides, this Court cannot modify the judgment so as to protect plaintiff's rights in the ditch and reservoir, because the record does not show what his rights are. It does not show how much land on each side of the ditch he is entitled to, nor does it show how many acres the reservoir covers. It may be one acre, and for aught that appears, it may cover almost the entire property. The power to grant or refuse new trials is one of legal discretion, and the abuse of it only will justify the appellate Court in interfering with such order. (*Hanson v. Barnhisel*, 11 Cal. 340; *Kimball v. Gearhart*, 12 Cal. 48; *Burnett v. Whitesides*, 15 Cal. 36; *Peters v. Foss*, 16 Cal. 358.)

Where it is evident that the Court or jury have acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be ordered. (*Minturn v. Burr*, 20 Cal. 48.)

By the Court, CURREY, C. J.

Ejectment for one hundred and sixty acres of land. The defendant's entry and ouster of the plaintiff is alleged to have been on 3d of September, 1864. The defendant denied by answer that the plaintiff was then seized or possessed of the

premises, or any portion thereof, except a reservoir and water ditch within the boundaries of the premises; and he denied further that he at any time ousted the plaintiff from the premises, or from any portion thereof, or that he unlawfully entered into the same. The defendant affirmatively answered in bar of the action the Statute of Limitations. Upon the issue so joined the cause was tried without a jury, and the Court found that the defendant entered upon the premises in November, 1859, under the belief that he had a right so to do, and that his entry was adverse to the plaintiff and was by the plaintiff so regarded, and that since such entry he had been in the quiet possession of the premises for more than five years next before the commencement of the action, and that neither the plaintiff, his ancestors, grantor or grantors, was or were at any time within five years next before the commencement of the action seized or possessed of the premises in controversy, and thereupon judgment was entered for the defendant. On motion for a new trial the plaintiff assigned divers errors. The Court granted the motion on the ground "that the answer admits that the plaintiff is entitled to a portion of the premises, and the Court erred in finding that the plaintiff was not entitled to recover the land or any portion thereof." The defendant has appealed from this order.

It is not necessary in passing upon the case to confine ourselves to the consideration of the particular ground on which the Judge of the Court made the order, because upon the transcript of the record before us we think the finding in favor of the defendant upon the Statute of Limitations was unwarranted by the uncontroverted evidence produced upon the trial by the parties respectively. In March, 1858, one Charles H. McMillan entered upon the land, and in the course of that year built thereon a dwelling house, barn and corral. In February, 1859, while McMillan was in possession by a tenant, he sold and conveyed the property to one Tevis, whose workmen and employés, among whom was the defendant, occupied the buildings on the premises during the year or

nearly all of the year 1859. The plaintiff derived from Tevis, by deeds of conveyance, two thirds of the property. It appears that the defendant continued to reside upon the premises from the time he and the other workmen occupied the houses thereon, in 1859, until the time of the trial. About the 1st of March, 1864, notice was given him on the part of Tevis, and others who claimed the property with him, that he must purchase, lease or quit the premises, when he replied that he would not surrender the possession or leave unless compelled to do so. In March, 1861, the defendant wrote a letter to Tevis, which was produced on the trial, explaining the manner in which he came into possession of the land in controversy, which he mentioned as a piece of land that Tevis had before then purchased for the purposes of the ditch and reservoir, and also proposing to purchase the same or to sell to Tevis the improvements which defendant had put upon the land. In the same letter he protested that he had entered into the possession of the property in good faith, without any purpose of jumping it, and closing with the request to Tevis to answer and let him (the defendant) know how he (Tevis) would settle the matter. The defendant testified that he located upon the property on the 28th of November, 1859, under a contract with one Hamilton, who claimed that he had purchased the same of Tevis, and who showed him at the time the deed from McMillan to Tevis. At that time the defendant contracted with Hamilton to purchase of him one half of it, but did not pay him anything for it until he bought him out entirely, in July, 1860. Before Hamilton sold out entirely, and before the defendant had paid him anything, the defendant was informed by Hamilton that he had no title to the premises.

We are of the opinion that the finding of the Court, that the defendant's entry was adverse to the plaintiff, was unwarranted by the evidence, and also that the finding to the effect that neither the plaintiff, his ancestors, grantor or grantors was or were, at any time within five years next before the action was commenced, seized or possessed of the premises,

Statement of Facts.

was a finding directly opposed to the evidence given at the trial on the part of both the plaintiff and defendant.

The order granting a new trial is affirmed.

WALTER A. SKIDMORE v. DANIEL T. TAYLOR.

DEPOSITION OF PARTY TO AN ACTION.—The testimony of a party to an action may be taken by deposition, if he resides out of the county in which his testimony is to be used, although he resides within less than thirty miles of the place of trial.

DEPOSIT TO SECURE SURETIES IN CRIMINAL RECOGNIZANCE.—Where money or property is deposited by a surety, on a recognizance in a criminal case, with a trustee, to secure his co-sureties on the recognizance, the People have no claim on the money or property in case the recognizance is forfeited, nor does the money stand in place of a recognizance.

SAME.—In such case, if the co-sureties consent that the trustee holding the money and property deliver it to the surety who deposited it, he cannot justify a refusal on the ground that a judgment has been recovered against the sureties on the recognizance.

REPLEVIN FOR MONEY.—Replevin is a proper remedy to recover a package of gold coin sealed up in a leather bag.

TERMINATION OF RELATION OF TRUSTEE.—Where one has received property or money in trust to hold for the security of sureties on a recognizance, a release by the sureties of all claim on the property and a demand on the bailee terminates the trust, and then becomes his duty to return the property to the bailor.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Walter Skidmore was arrested on a criminal charge, in Marin County, on the 10th day of December, 1859, and an order was made by the examining magistrate holding him to bail in the sum of five thousand dollars. Walter A. Skidmore, the plaintiff, and Louis Denos, and Egbert Van Allen, signed the recognizance, and to secure Denos and Van Allen, the plaintiff deposited with Daniel T. Taylor, the defendant, a buckskin bag, sealed up, containing sixteen hundred and twelve dollars in gold coin, and a number of warrants drawn by the Auditor of Marin County on the Treasurer of that county.

This action was commenced July 2d, 1861, for a return of

Argument for Respondent.

the property, or if a return could not be had, for judgment for its value. On the 8th day of February, 1860, Denos and Van Allen signed a writing consenting that Taylor deliver the property up to W. A. Skidmore, the owner, and releasing all claim on it. W. A. Skidmore presented the writing to Taylor and demanded the property, but Taylor refused to deliver it up. Thomas H. Hanson was made a defendant in the action, but plaintiff dismissed the action as to him before the case was submitted. During the trial, plaintiff offered in evidence the depositions of both Taylor and Hanson, the defendants. The defendants' attorney objected to the depositions. It was admitted that both of defendants resided in San Rafael, Marin County, within less than thirty miles of the City of San Francisco, the place of trial, and that defendant Taylor was then in Court. The Court overruled the objection and admitted the depositions in evidence.

Plaintiff recovered judgment in the Court below, and defendant appealed.

Patterson, Wallace & Stow, for Appellant, on the admission of the depositions of the defendants Taylor and Hanson, cited Practice Act, Secs. 402, 407, 409, 411; and *Jackson v. Hobby*, 20 John. 357; and *Flemming v. Hollenback*, 7 Barb. 275.

On the question of Taylor's liability to turn over the trust funds to the People, they cited 18 Ill. 83; 6 Clarke, Iowa, 223; and 1 Miss. 175.

They also contended that replevin was not the proper remedy for the gold coin, and cited Note 1, p. 5, Fidd's Prac.; 12 Wend. 50; and *Adams v. Gorham*, 6 Cal. 68.

S. F. & J. Reynolds, for Respondent, on the admission of the depositions, cited Practice Act, 428; and *Shafter v. Richards*, 14 Cal. 125, and contended that the People had no interest in the property, and cited *People v. Skidmore*, 17 Cal. 261. They also made the point that defendant Taylor had no right to take collateral security for the benefit of the People, and cited *Stearnes v. Agui  rre*, 7 Cal. 449.

By the Court, RHODES, J.

There was no error in admitting the depositions of Hanson, Bullis and Taylor. Section four hundred and twenty-eight of the Practice Act provides that testimony may be taken by deposition, where the witness is a party to the action. Hanson and Taylor were defendants to the action. The section also provides that the testimony may be taken by deposition when the witness resides out of the county in which his testimony is to be used. All of those witnesses resided out of the county in which the action was tried.

The Court found that Denos and Van Allen, for whose benefit the property in suit was deposited by the plaintiff with Taylor, released and discharged all claim upon the property, and directed Taylor to deliver the same to the plaintiff, and that on the 9th of February, and before the commencement of this action, the plaintiff presented said release and directions to Taylor, and demanded the delivery of the property, and that Taylor refused to deliver it to him. It is objected to this demand that it was insufficient, because at that time there was in full force a judgment upon the recognizance executed by the plaintiff and Denos and Van Allen; and that at that time Taylor was liable to turn over the property to the People, according to the conditions of the instrument by which the property was placed in his hands. The recognizance was executed upon the order of the examining magistrate admitting Walter Skidmore to bail, and was in full force when the property was deposited with Taylor by the plaintiff. It was not intended that the property should stand in lieu of the recognizance, even if such a proceeding was authorized by the statute; nor were the People parties to the bailment; but, so far as they were concerned, it was entirely gratuitous; and for that reason, and for the further reason that such a transaction is not authorized by the statute regulating proceedings in criminal cases, the People had no claim on the property deposited, as was the case here, by one surety to indemnify his co-sureties.

Opinion of the Court — Rhodes, J.

The authorities are very clear that replevin is a proper remedy for the recovery of a parcel of money "sealed up in a buckskin leather bag," as it is described in the complaint. (3 Black.'s Com. 151; *Griffith v. Bogardus*, 14 Cal. 410.)

When the demand was made of Taylor, the property was in his possession, and it would be useless to inquire what remedy, if any, the plaintiff would have possessed, if Taylor had appropriated the property to the satisfaction of the judgment on the recognizance; but the release and demand terminated the trust, leaving incumbent on the bailee only the duty to return to the bailor the property deposited.

Judgment affirmed.

Neither Mr. Chief Justice CURREY nor Mr. Justice SAWYER expressed any opinion.

THE PEOPLE v. JAMES GARNETT.

EXCLUSION OF WITNESSES DURING A TRIAL.—The exclusion of the witnesses on the part of the prosecution, on the motion of the defendant, in a criminal action, is not a matter of absolute right, but rests in the discretion of the Court.

TESTIMONY OF AN ACCOMPLICE IN A CRIMINAL CASE.—Where the prosecution rely on the testimony of an accomplice, jointly indicted with the defendant, the defendant should not be discharged at the close of the testimony for the prosecution, if the accomplice's testimony has been corroborated in some particulars.

IMPEACHMENT OF WITNESS.—A witness cannot be impeached by proof that he has made statements out of Court contrary to what he has testified to on the trial, unless the witness was asked as to the statements made out of Court, and the time when, place where, and person to whom made.

BURGLARY MIXED WITH LARCENY.—Our criminal code describes no such offense as burglary mixed with larceny or another felony.

INDICTMENT CHARGING TWO OFFENSES.—Under our criminal code, an indictment which charges a burglary mixed with a larceny, charges two offenses. If in connection with a burglary another offense has been committed, it must be made the foundation of a separate indictment.

SAME.—If the indictment charges two offenses, the objection is waived unless it is taken by demurrer.

TRIAL WHERE INDICTMENT CHARGES BURGLARY MIXED WITH LARCENY.—If the indictment charges a burglary mixed with a larceny, and no demurrer is interposed, and the case is conducted upon the theory that the defendant is on trial for burglary alone, the Court cannot, after the case is submitted and the jury have retired, change the issue by instructing the jury that they may find the defendant guilty of grand larceny.

Statement of Facts.

LARCENY IS NOT INCLUDED IN BURGLARY.—Larceny, if committed at the same time a burglary is committed, is not included in the burglary, as manslaughter in murder; the larceny is no part of the burglary.

APPEAL from the County Court, Sacramento County.

The indictment charged the defendant with having, in the night time, feloniously and burglariously entered the house of T. Schroder, with intent to steal his goods, and with having then feloniously and burglariously stolen four hundred pounds of his beef.

On the trial the defendant moved the Court to exclude all the witnesses from the Court room except the witness on the stand. The motion was granted, except as to F. F. Burke, the Chief of Police of Sacramento. The prosecution relied principally on the testimony of Daniel Long, who was an accomplice, and was jointly indicted with Garnett, but Long's testimony was corroborated in some particulars by other witnesses.

When the prosecution rested, the defendant's attorney moved the Court to discharge the prisoner, because the witness, Long, was an accomplice, and no circumstances had been proved by any other witness connecting defendant with the crime. The Court denied the motion.

After Burke had been examined by the prosecution, defendant's attorney asked him if he did not make certain statements to the defendant, in the presence of Bruce, Hidden, and Deal, on J street, between Second and Third streets, without asking as to the time or particular place? Burke denied having made such statements.

The defendant called a witness after the prosecution had rested, and proposed to prove that Burke made the statements. The District Attorney objected, because the proper foundation had not been laid for the testimony. The Court sustained the objection. The defendant appealed.

The other facts are stated in the opinion of the Court.

Coffroth & Spaulding, for Appellant, on the question of the refusal of the Court to discharge the defendant after the prose-

Argument for The People.

cution rested, cited Wood's Digest, p. 299, Sec. 375; *People v. Eckert*, 16 Cal. 110; Roscoe's Crim. Ev. 157-159; *Rex v. Webb*, 25 Eng. C. L. 556; *Rex v. Addis*, Id. 452; *Reg. v. Dyke*, 34 Id. 381.

On the refusal of the Court to allow the impeachment of Burke's testimony, they cited 1 Greenleaf on Ev., Sec. 462; *Regina v. Holden*, 8 C. & P. 606; 2 Barb. S. C. R. 210. They also contended that the Court erred in recharging the jury upon new matter, and that the Court derived its power to charge the jury from the Criminal Practice Act, and that that Act only gave it power to charge the jury before they retired to deliberate, and not to recall them after they had failed to agree, and charge them in relation to new issues not raised during the trial, and cited Wood's Dig., page 297, Sec. 362; 8 Cal. 341; Id. 423; 12 Cal. 345; 14 Cal. 437; and 26 Cal. 79.

J. G. McCullough, Attorney-General, for the People, on the question of the refusal to exclude witness Burke, cited 1 Greenleaf's Ev., Sec. 432, and Notes. He also contended that it was proper for the Court to recharge the jury, there being a disagreement, and cited Crim. P. Act, Sec. 408; *People v. Robinson*, 17 Cal. 368; and *People v. Boggs*, 20 Cal. 434; and argued that there was no error in the charge when the jury were recalled, to defendant's prejudice, and cited Cr. P. Act, Sec. 424; and *People v. Davidson*, 5 Cal. 534. He contended that the concurrence of two interests were necessary to constitute burglary; the first, to break into the house, must be executed; the second, to commit the felony or misdemeanor specified in the statute, might or might not be executed. If the latter was executed, there might be two offenses in the transaction, at the election of the pleader, or only one as in this indictment, and cited *People v. Franks*, 28 Cal. 507; and 1 Bishop's Crim. Law, Sec. 251. The latter intent must be proved, and nothing will answer as a substitute; and this indictment must necessarily cover larceny, as it not only charges the intent to commit, but also the actual commission

of the larceny, which pleading was perfectly proper and the better mode. And under such an indictment the defendant may be convicted of the larceny alone; in other words, he may be convicted of just so much of the charge as is proved. Nor can the defendant with any justice complain, as he might have been indicted for the burglary, and also for larceny, separately, and punished for both. (1 Bishop's Crim. Law, Secs. 251, 687, 539, 539a, 540; 2 Bishop's Crim. Law, Sec. 96, and the cases cited.)

By the Court, SANDERSON, J.

The Court did not err in refusing to exclude the Chief of Police with the other witnesses. The exclusion of witnesses on the part of the prosecution, on the motion of the defendant, is not a matter of absolute right in all cases, but rests very much in the discretion of the Court, which may be exercised in favor of the defendant's application or not, according to the circumstances of the case. (1 Greenleaf on Ev., Sec. 432.)

Nor did the Court err in refusing to discharge the defendant at the close of the testimony for the prosecution. The testimony of the accomplice was corroborated by other evidence in regard to several particulars, which at least tended to connect the defendant with the commission of the offense charged.

Nor did the Court err in sustaining the objection of the District Attorney to the testimony of the witness Bruce offered for the purpose of impeaching the testimony of Burke. The proper foundation for the admission of such testimony had not been laid. (1 Greenleaf on Ev., Sec. 462.)

Indictment for burglary.

The indictment would have been bad on demurrer had one been interposed, upon the ground that it contains two separate offenses: 1 — burglary; and 2 — grand larceny. At common law there are two kinds of burglary: 1 — Complicated

and mixed with another felony; and 2 — simple burglary; for which different punishments were inflicted. (1 Hale's Pleas of the Crown, 549.) Hence at common law an indictment for the first necessarily comprised two offenses — burglary and such other felony as may have been committed in connection therewith — and the defendant could be acquitted of the burglary if the case was so upon the evidence, and found guilty of the other felony only (Id. 559.) Our criminal code, however, describes no such offense as burglary complicated and mixed with another felony. It describes simple burglary only. Hence under our practice burglary cannot, more than any other offense, be united in the same indictment with another offense. If in addition to the burglary, another offense has been committed, it must be made the foundation of a separate indictment. When, however, both offenses are stated in the same indictment, the objection must be taken by demurrer, or it will be deemed waived, and a verdict of guilty of either offense will not be disturbed on that ground. In the present case the objection was not taken by demurrer, but on motion in arrest of judgment, which was too late, as we held in *Shotwell's Case*, (27 Cal. 394.)

Recalling a jury and charging them as to a new issue.

Nevertheless, after a careful examination of the record, we are satisfied that there was sufficient error at the trial to justify us in setting aside the verdict. We are satisfied that the defendant was in fact tried for one offense and found guilty of another. He was tried for burglary and found guilty of grand larceny. This is especially apparent from the instructions of the Court given at the close of the argument. That up to that time the defendant had been regarded by Court, counsel and jury as on trial for burglary only, does not, in our judgment, admit of doubt. The statutory definition of burglary was first read to the jury, and they were then told in substance "that if they found from the evidence that the defendant in the nighttime of the 3d of March, 1865, broke and entered the outhouse mentioned in the indictment, or without

force, the doors and windows being open, entered said house, with the intent to commit grand or petit larceny, they must find him guilty as charged in the indictment. If, on the contrary, they did not find from the testimony that he entered said house in the night time, with the intent to commit larceny, they must find him *not guilty*." They were not told that if in their judgment the evidence did not sustain the charge of burglary they might inquire whether it sustained the charge of larceny. On the contrary, in the former event they were expressly told to find a verdict of "not guilty." The statutory definition of grand larceny was not read to them, nor were they told that under the indictment they could acquit the defendant of burglary and find him guilty of grand larceny, if they should so find the case upon the evidence. On the contrary, nothing whatever was said by the Court upon the subject of larceny. Its silence in that respect admits of but one explanation, which is that up to that time grand larceny, as a separate and distinct offense, had not been regarded as embraced within the issue, but on the contrary, had been entirely ignored and overlooked by Court, counsel and jury, except so far as it was to be considered in connection with the question of intent as an element in the offense of burglary.

After the jury had been out three hours without being able to agree upon a verdict, without any request on their part for further information upon any point of law, or any disagreement between them as to any part of the testimony, (see the four hundred and eighth section of the Criminal Practice Act,) all of which clearly appears from the record, they were recalled into Court by order of the Judge, of his own motion, and against the protest and under the exception of the defendant's counsel, and then told for the first time, in substance, "that the indictment covered two offenses, burglary and grand larceny, of which the former was the higher and included the latter; and that they might, therefore, if they so found the case from the evidence, find the defendant guilty of grand larceny."

Thereupon the jury retired, and immediately thereafter returned with a verdict of guilty of grand larceny.

From the foregoing, which is fully sustained by the record, in our judgment, we are able to draw but one conclusion, which is, as has been already stated, that up to the time the jury was recalled the case had been conducted entirely upon the theory that the defendant was on trial for but one offense, and that that offense was burglary; and further, that the idea that he might also be tried for grand larceny was not suggested until after the case had been argued by his counsel and formally given to the jury. That so sudden a shifting of the issue, without time for further argument, might operate to the legal prejudice of the defendant, does not admit of doubt. That it may have done so is apparent from the fact that on the question of burglary the jury were out three hours without being able to find a verdict, while on the question of larceny they immediately agreed.

Larceny not included in burglary.

It is proper to add in this connection that the learned Judge of the Court below was mistaken in supposing, as he seems to have done, that this case was within the four hundred and twenty-fourth section of the Criminal Practice Act, which provides that "in all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment." * * * Larceny is not necessarily included in burglary, like manslaughter in murder, within the sense of the statute; on the contrary it is no part of it. The offense of burglary is complete without any larceny being committed. The relation contemplated by the statute does not exist between burglary and such other felony, if any, as may chance to be committed by the defendant at the same time.

Judgment reversed and a new trial ordered.

Opinion of Sawyer, J., dissenting.

Mr. Justice SAWYER delivered the following dissenting opinion, in which Mr. Justice SHAFER concurred:

I am unable to concur with a majority of my associates in respect to the point upon which the judgment is reversed.

The Court having charged the jury, they retired, in custody of an officer, to consider the case. After deliberating some three hours without being able to agree upon a verdict, the jury were called into Court by direction of the Judge, and a further charge given, as follows: "The indictment in this case covers two offenses, burglary and grand larceny. Of the two offenses burglary is the highest, and includes the larceny. You may therefore in this case, if the evidence warrants you in so doing, find the defendant guilty of burglary; or, if you do not find from the evidence that the defendant was guilty of the crime of burglary, but you do find from the evidence that he was guilty of the crime of grand larceny, you may so return your verdict accordingly." The defendant objected and excepted: firstly, to the giving of any further charge after the jury had once retired; and secondly, to the charge as erroneous. As to the first objection, section four hundred eight of the Criminal Practice Act provides that, if after the jury have retired for deliberation, "They desire to be informed on any point of law arising in the case, they must require the officer to conduct them into Court;" and it thereupon makes it the duty of the Court to give the information. Thus the Court is authorized and required, in certain contingencies, to give a further charge. In this case the Court gave further information upon a point of law, and we do not think the authority of the Court was in any respect transcended, even if there was no request on the part of the jury to receive further information.

At common law it was admissible for the Judge to give a further charge after the jury had retired, provided it was given in open Court, and it was often done privately by the Judge. But the latter practice has been very properly condemned. (2 Grah. N. Tri. 356, *et seq.*; *Kirk v. State*, 14 O.

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512.) There is nothing in our Criminal Practice Act, expressly or by implication, prohibiting the giving of a further charge in open Court after the cause has been once submitted to the jury. The Act simply gives the jury the right, when further information is desired, to "require the officer to conduct them into Court" for the purpose of asking the required information, without limiting the authority of the Judge to direct them to be brought in for the purpose of giving further information on his own motion.

But the Court said: "The indictment in this case covers two offenses—burglary and grand larceny. Of the two offenses burglary is the highest, and includes the larceny." And it is insisted that the expression "burglary is the highest" is erroneous, for the reason that the degree must be determined by the severity of the punishment, and the imprisonment for larceny may be for a longer period than for burglary. But, however this may be, the particular statement is wholly immaterial and could not have affected the verdict. The important question was whether the indictment in fact embraced the crime of grand larceny; and it is perfectly clear that it did. It charges that the said defendant "forcibly, feloniously and burglariously did break and enter with intent the goods, chattels, etc., in said house, etc., feloniously, forcibly and burglariously to steal, take and carry away, etc., and then and there forcibly, feloniously and burglariously did steal, take and carry away," etc. The *whole* charge included a burglary and larceny—a *part*, a larceny included within the whole. No question is made as to the propriety of including the two offenses in the same indictment.

As to the proposition that the case was tried upon the theory that the indictment charged a burglary only, I only deem it necessary to say, that the evidence, as well as the indictment, covers both offenses, and that we do not know that the case was tried upon such theory. An ox had been slaughtered in the evening and hung up in an outbuilding, the door of which was closed and locked, and the key deposited in a place accessible to any party knowing where it was. The

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parties who committed the larceny by some means effected an entrance into the building, as the beef could only have been taken out by means of such entrance. If a larceny was committed, there must necessarily have been a burglary also, within the statutory definition of that offense. In view of this state of facts the Court, in all probability, did not deem it necessary to refer to the charge of larceny in the first instructions given, for the reason that, upon the evidence, if the defendant was guilty of any offense at all, he must necessarily have been guilty of burglary, as well as larceny; and the Court regarded the burglary as the higher offense. If the evidence had been, or could in the nature of things have been different with respect to the two offenses charged, there might be some force in the suggestion, if true, that the defendant was only tried for the burglary. But, in this instance, the evidence proving the burglary necessarily proved a larceny, and the evidence proving the larceny necessarily proved a burglary. The jury had no difficulty in convicting of the larceny, and it is difficult to account for their acquittal of the burglary upon any other theory than that they labored under some misapprehension as to what constitutes burglary. The evidence tended to show that one of the parties knew where the key to the outhouse was kept, and that the key was probably obtained, and after unlocking the door and taking the beef returned to its place. It may be that the jury supposed the entrance to have been made in this mode, and, under a misapprehension of the charge, that, as the entrance was effected without violence, it did not constitute a burglary. But it is useless to speculate upon the matter. The Court correctly stated that the indictment covered both a burglary and a larceny, and the evidence was as clearly applicable to a charge of larceny as burglary, and, I think, proved both offenses. Had the prisoner been tried for a larceny alone, the evidence must necessarily have been the same. The evidence being sufficient, the defendant was properly convicted of grand larceny under the indictment. (*People v. Frank*, 28 Cal. 507; 1 Bishop Crim. Law, Secs. 251, 539, 539a, 540, 687, 688, and

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cases cited in Notes; 2 Ib. 96.) I think the judgment should be affirmed.

THE PEOPLE *ex rel.* MATHEW LAMBY v. S. H. DWINELLE, JUDGE OF THE FIFTEENTH JUDICIAL DISTRICT.

JURISDICTION TO PUNISH FOR CONTEMPT.—District Courts have jurisdiction to punish for contempt persons who re-enter upon a tract of land after having been dispossessed therefrom by a judgment and process of a Court of competent jurisdiction.

CERTIORARI.—The Supreme Court, on certiorari, will only inquire whether the inferior Court exceeded its jurisdiction.

ACT OF 1862 TO PUNISH CONTEMPTS.—The Act of 1862 for the punishment of contempts committed by re-entering on land after having been dispossessed by judgment and process of a Court, was designed not only to protect the Court from contempt of its authority, but to give a party injured an additional remedy in the action, for the restoration of what he was entitled to by the judgment.

THE facts are stated in the opinion of the Court.

James C. Zabriskie, for Relator, contended that at the hearing of the contempt case, the fact was established that Lamby, before he entered the second time on the land, had acquired the title of the United States to the same, and that this determined the question of right *absolutely*, and equally determined that the Court had no jurisdiction, and cited *Whitney v. Board of Delegates of San Francisco*, 14 Cal. 500.

M. S. Chase, for Respondent.

Review on certiorari can be had only upon the concurrence of three contingencies, not upon the occurrence of any one of them: 1. Where there has been an excess of jurisdiction. 2. Where no appeal lies. 3. Where no plain, speedy and adequate remedy exists. (Prac. Act, Sec. 456.) "Where an appeal is given by the statute, that remedy is exclusive and must be pursued." (*Haight v. Gray*, 8 Cal. 300; *Clay v. Hoagland*, 13 Cal. 173; *S. N. and Placer R. R. Co. v. Harlan*, 24 Cal. 354.)

The order fining petitioner for contempt was a "special

order made after final judgment in the ejectment suit, and as such appealable from within sixty days from its date." (Prac. Act, Secs. 336 and 347.)

"The remedy of the defendant is by appeal, and not by writ of review. The latter lies only when the former does not." (*The People ex rel. Sturges v. Shepard*, 28 Cal. 115.)

By the Court, CURREY, C. J.

Certiorari for the purpose of reviewing the proceedings had in the District Court of the Fifteenth Judicial District in and for the County of Contra Costa, and the order of conviction by said Court rendered against the relator for contempt.

In June, 1864, M. S. Chase obtained judgment in said Court against Mathew Lamby as defendant, who soon thereafter was ejected from the premises under an execution issued on the judgment, and Chase was put in possession thereof. In March, 1865, while Chase was in the actual possession of the premises, Lamby re-entered into and upon the same, and against the will of Chase took possession thereof, and ousted Chase therefrom, and thereupon committed divers acts of trespass by felling timber growing on the premises, and particularly in cutting, girdling and felling ornamental and shade trees of great and essential value to the premises. Subsequently, in April, 1865, upon proceedings in the ejectment suit, duly instituted, Lamby was brought before the District Court to show cause why he should not be punished for the commission of the acts above mentioned as for contempt of Court. Lamby having appeared, made answer. After hearing and trying the matter in issue, the Court found and adjudged Lamby to be guilty of a contempt of Court and of its judgment and process by reason of the acts complained of, and rendered in due form a judgment or order of conviction against him, that he be fined for committing such contempt in the sum of one hundred and fifty dollars.

The proceedings against Lamby as for contempt were insti-

tuted under and by authority of the Act entitled "an Act for the punishment of contempts and trespasses," passed in 1862. (Laws 1862, p. 115.) That Act provides that "every person who shall have been or who shall be hereafter dispossessed or ejected from or out of any piece, parcel, lot or tract of land by judgment, decree or process of any Court of competent jurisdiction, and who, not having legal right so to do, shall re-enter into or upon, or take possession, of any such land or any part thereof," etc., "shall be deemed guilty of a contempt of the Court by which such judgment or decree was rendered, or from which such process issued, and shall be tried and punished therefor in the same manner and form as now provided by law in case of a contempt not committed in presence of the Court." The defense which Lamby made did not satisfy the District Court that his re-entry after he had been dispossessed under the judgment in the action of ejectment was by legal right. Whether the Court was right or wrong upon the merits of the issue joined upon these proceedings is not the question before us, but whether the Court exceeded its jurisdiction is the subject of inquiry.

The Act of 1862 authorized the proceedings taken which resulted in a judgment of conviction against Lamby for contempt. The Court had jurisdiction of the subject matter and of the person of the respondent, and even if it were admitted that the Court erred upon the merits, it cannot be said the judgment for that reason was *coram non judice*. The proceeding must be held to have reference to the action of ejectment and the judgment rendered therein, and the process of execution on such judgment and the dispossessing of Lamby from the premises in controversy in that action. The Act of 1862 was designed not only to protect the Court itself from contempt of its authority, judgment and process, but also to give to the party materially injured by the acts constituting the contempt, an additional remedy in the action for the restoration to him of what he was entitled to by the judgment, and of which he had been deprived by the acts constituting the contempt. The second section of the Act of 1862 provides

Opinion of Sawyer, J., concurring.

that upon a conviction of the party re-entering in defiance of the judgment and of the process thereon issued and executed, for contempt, the Court shall immediately issue an alias process directed to the proper officer, and requiring him to restore the party entitled to the possession of the property, under the original judgment or process, to the possession of which he shall have been dispossessed by the wrongful conduct or act declared in the statute to be a contempt.

We are of the opinion the relator has mistaken his remedy, and that the writ of certiorari should be dismissed, and it is accordingly so ordered.

SAWYER, J., concurring.

The District Court had jurisdiction to inquire and determine whether the re-entry of the applicant for the writ of review, after having been dispossessed under the judgment and execution, was "without legal right so to do." The Court, after acquiring jurisdiction of the person for that purpose, examined and determined the question in the proper form. It may or may not have erred in the conclusion attained; but however this may be, error in judgment in respect to a question which the Court is authorized to investigate and determine does not constitute an excess of jurisdiction. If it did, every error committed by the Court in the course of judicial investigation would be an excess of jurisdiction. I think the Court regularly pursued its authority, and did not exceed its jurisdiction; and beyond this we are not authorized to inquire in this proceeding. We cannot correct mere errors on the writ of review. (Practice Act, Secs. 456, 462.) The writ must therefore be dismissed.

THE PEOPLE v. JOHN WOODS.

EXAMINATION OF TRIAL JURORS.—In an examination of trial jurors as to their competency, in a criminal case, the defendant is not restricted to the inquiry whether the juror can try the case and render a verdict under the

Opinion of the Court — Sanderson, J.

law as declared by the Court, and upon the evidence adduced, without regard to any previously formed opinion.

COMPETENCY OF JUROR.—The competency of a juror must be determined by the Court, and not by the juror.

APPEAL from the District Court, Eighth Judicial District, Humboldt County.

The defendant was indicted for murder, and was convicted of murder in the first degree and sentenced. The defendant appealed.

The other facts are stated in the opinion of the Court.

Robinson & Dunlap, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, J.

It appears from the record in this case that as counsel for the defendant was about to commence the examination of persons called as jurors, touching their competency, the presiding Judge, of his own motion, ruled that the examination should be confined to the question: "Whether a juror could or could not try the case and render a verdict under the law as declared by the Court and upon the evidence adduced upon the trial, without regard to any previously formed opinions;" to which ruling the counsel excepted.

The subsequent proceedings show that this rule was practically applied and uniformly adhered to as a test of competency during the whole time the jury was being impanelled. Under its operation no less than five persons, who stated in decided terms that they had either formed or expressed an unqualified opinion as to the guilt or innocence of the defendant, were adjudged competent jurors, upon their giving an affirmative answer to the stereotyped question of the Court. Under its operation the pertinent questions of counsel and the answers thereto clearly showing legal incompetency on the part of some of the jurors were entirely ignored and disregarded, and the question suggested by the Court was made the sole test of

Statement of Facts.

competency; as if, instead of being contrary to every known legal principle, it embodied all the rules of law bearing upon the question under investigation. Under its operation each juror was made the judge of his own competency, instead of the Court; and his own opinion as to his fitness, instead of the law of the land, was made the rule of decision. The law does not subject the liberty and life of the citizen to the hazard of such a rule. If it did, the right of trial by jury would become of very doubtful value.

Judgment reversed and new trial ordered.

JOHN GILLAM AND J. C. POTTER v. DAVID SIGMAN.

OBJECTION TO MISJOINDER OF PARTIES PLAINTIFF.—The objection that too many persons are joined as plaintiffs must be taken advantage of by demurrer, if it appear on the face of the complaint, and if it does not so appear, by answer, or the same is waived.

AMENDMENT TO ANSWER DURING TRIAL.—If the defendant does not know that too many persons are joined as plaintiffs until the same appears in evidence, he should then apply for leave to amend his answer.

DENIAL DOES NOT RAISE ISSUE OF MISJOINDER OF PLAINTIFFS.—Where two are joined as plaintiffs in an action for the recovery of possession of land, a denial in the answer that the plaintiffs were in possession of the land, does not present the issue of a misjoinder of either of the plaintiffs.

PROOF OF A CONVERSATION.—If the plaintiff, during a trial, draws out of one of his witnesses part of a conversation between the plaintiff and another person, the defendant is entitled to prove by his witnesses the whole conversation.

CONVERSATIONS IN EVIDENCE.—A declaration made by a third person to and in the presence of the parties engaged in a controversy, at the time of the doing of an act by one of them that becomes the subject of an action, is admissible in evidence, and becomes a part of the *res gesta*.

COMPLAINT IN FORCIBLE ENTRY AND DETAINER.—A complaint in forcible entry and detainer should not contain allegations respecting the defendant's appropriation of personal property.

APPEAL from the County Court, Napa County.

The complaint averred that the defendant, since his forcible entry and detainer, had been occupying the premises and using the stock in trade and tools of the plaintiffs, and appropriating the same to his own use and benefit, and that, if defendant was not restrained by legal process, the property of

plaintiffs, of the value of one thousand dollars, would be rendered valueless, or appropriated by defendant to his own use, before the case could be heard. The defendant appealed.

The other facts are stated in the opinion of the Court.

Hartson & Tucker, for Appellant, as to the refusal of the Court to allow defendant to prove the conversation between Lillie and defendant in Gillam's presence, cited 1 Greenleaf on Evidence, 225, and as to a misjoinder of plaintiffs by making Potter one of plaintiffs, 1 Chitty on Pleadings, 66.

They also argued that the action of forcible entry and detainer was *quasi* criminal, and in derogation of the common law, and the statute must be strictly construed, and that there must be a joint possession and a joint ouster to enable plaintiffs to unite in the action.

P. W. S. Rayle, for Respondents, argued that the answer admitted the possession of plaintiffs, as charged in the complaint, and that an issue as to their joint possession could not now be raised, and that the rules of pleading adopted in other civil cases applied to forcible entry and detainer, and cited Laws 1863, Sec. 14, p. 655; *Goodwin v. Hammond*, 13 Cal. 169; *Riddle v. Baker*, Id. 302, and *Payne v. Treadwell*, 16 Cal. 243.

He also made the points that defendants had not taken the objection to a misjoinder of parties plaintiff, either by demurrer or answer, and that Lillie's declaration was hearsay, and not admissible.

By the Court, RHODES, J.

This is an action of forcible entry and detainer. The plaintiffs allege that they and each of them were in the peaceable and actual possession of a town lot in the Town of St. Helena, and that while they were so in possession, on or about the 4th day of February, 1865, the defendant illegally and forcibly entered into and upon said premises, and ejected the plaintiffs, and from thence has forcibly detained, and still does forcibly

detain, the possession from the plaintiffs. The defendant, for answer, among other things, denies "that on the 4th day of February, 1865, said plaintiffs were in the possession of the premises described in the complaint," and he denies the alleged forcible entry and detainer.

It appears from the evidence that upon the premises there were a blacksmith shop, a wood shop and a room adjoining the wood shop; that on the 4th of February, the time of the alleged forcible entry, Gillam was in possession of the wood shop, Potter in possession of the blacksmith's shop, as Gillam's lessee, and defendant in possession of the room adjoining the wood shop, occupying it with the permission of both of the plaintiffs; that the defendant on that day forcibly ejected Gillam from the wood shop, but did not interfere with Potter, nor forcibly enter upon any portion of the premises except the wood shop. The plaintiffs had verdict and judgment for the restitution of the whole of the premises.

The defendant assigns for error the refusal of the Court to give to the jury three certain instructions, which together amount to this: that unless the jury are satisfied from the evidence that at the time of the forcible entry, both of the plaintiffs occupied the premises, and occupied them jointly, they must find for the defendant; in other words, that if the evidence shows that too many persons have been joined as plaintiffs, they must fail in the action.

Misjoinder of plaintiffs.

The rule at common law was that the objection, if it appear on the record, may be taken advantage of by demurrer, in arrest of judgment, or a writ of error; or if the objection do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial. (1 Chit. Plea. 56.) But a different rule has been established by the Practice Act.

One of the grounds of demurrer stated in section forty of the Practice Act is a misjoinder of parties plaintiff or defendant, where the objection appears upon the face of the complaint; and if the misjoinder does not so appear, it is provided

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by section forty-four that the objection may be taken by answer; and section forty-five declares that if such objection be not taken either by demurrer or answer—that is, by demurrer when the defect appears upon the face of the complaint, or by answer when it does not so appear—it shall be deemed to be waived. Here the defect did not appear upon the face of the complaint, and the defendant should have taken the objection by his answer. The defendant is presumed to be able to meet every allegation of the complaint, either positively or upon information and belief. If it is true—as the evidence that was introduced strongly tended to prove—that Gillam and Potter were in possession in severalty of distinct portions of the premises mentioned in the complaint, and that Gillam alone was in the possession of the wood shop, the only portion upon which it can be claimed a forcible entry was made, the defendant is presumed to know or have information and belief of that fact; but if he did not, there could have been no difficulty in his procuring leave to amend his answer and the plaintiff to amend the complaint, upon that fact appearing in evidence. (*Bonsteel v. Vanderbilt*, 21 Barb. 26.)

The evidence shows a misjoinder of the plaintiff Potter, and the defendant, under the imperative rule of the statute, should have taken advantage of the defect by answer. The rule, in case the defect does not appear upon the face of the complaint, is as inflexible as when it does appear there; and the presumption of a waiver of the objection, when there is in truth a misjoinder, though not appearing on the face of the complaint, and the defendant has failed to take the objection by answer, is as conclusive as when it does appear upon the face of the complaint and the defendant has failed to take the objection by demurrer. We think no question would be made if in this case the plaintiffs had stated that Gillam alone was in the possession, and the defendant had failed to demur on the ground of the misjoinder, that he would be deemed to have waived the objection.

Issue of misjoinder of plaintiffs.

The denial of the defendant, that on the 4th day of February, 1865, the plaintiffs were in possession of the premises, giving it the most favorable construction for him, amounts, at most, to no more than a denial that both plaintiffs were in possession, and it certainly does not present the issue of the misjoinder of either of the plaintiffs. (*Fosgate v. Herkimer Nav. and Hyd. Co.*, 12 N. Y. 582.) That objection being waived, it was not error to refuse those instructions.

Conversations in evidence.

On the trial the plaintiff Gillam testified as a witness in his own behalf, that on the 4th of February, 1865, the defendant and one Lillie were in the wood shop, and Gillam having come to the shop from another building, at the request of Lillie or the defendant, Lillie and Gillam entered into a conversation about the shop and tools, and during the conversation Lillie handed to the defendant a paper, saying he had sold his interest in the shop and tools to the defendant; and upon the witness proceeding further to state the conversation of Lillie he was stopped by the Court, upon the objection of the plaintiffs' counsel. The defendant subsequently offered to prove by his own witnesses what Lillie in that conversation said to Gillam, in regard to putting the defendant in possession of the shop, but the testimony was excluded upon the objection of the plaintiffs.

The testimony was admissible upon two grounds. The plaintiffs had drawn out a part of the conversation, and that gave the defendant the right to call for the remainder. The conversation having taken place at the time of the alleged forcible entry, and it relating to the subject matter of the controversy between the parties, formed a part of the *res gestæ*. The facts, circumstances, or declarations which grow out of the principal fact in question, which are contemporaneous with it, and serve to illustrate, qualify or explain it, constitute

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the *res gestæ*. The declaration of a third person, made to and in the presence of parties engaged in a controversy, at the time of the doing of an act by one of them, that becomes the subject of an action, may not only be well calculated, but essential, to explain the motives, conduct and acts of the parties. There is no distinction in principle between such a declaration, and one made at the same time by one of the parties. (1 Phil. Ev., C. H. and E. Notes, p. 188, Note 81.)

Counsel will of course understand that we do not undertake to accord any definite value to the declaration when given in evidence; and if it should turn out that the declaration was as the parties assume it to have been — that Lillie had put the defendant in possession of the shop — it might have but slight tendency to prove, that at that time the defendant in fact had the possession.

As the cause must go back for a new trial, where the parties may, if necessary, procure leave to amend their pleadings, and as we have adverted to a defect in the answer, it is not improper to say that this action being designed by the statute as a remedy for certain injuries to the possession of real property, the plaintiffs' allegation respecting their tools and stock in trade in the shop, and the defendant's appropriation thereof to his own use, have properly no place in the complaint.

Judgment reversed and the cause remanded for a new trial.

Mr. Justice SAWYER expressed no opinion.

THE PEOPLE v. JOHN ROONEY *et als.*

JUDGMENT AGAINST SURETIES ON OFFICIAL BONDS.—A judgment in an action against the sureties on an official bond, for a defalcation of the principal, should first fix the amount of the defalcation, and then proceed with a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, and then close with a proviso, that each judgment shall be satisfied by the collection or payment of the amount of the defalcation, and costs.

APPEAL from the District Court, Thirteenth Judicial District, Mariposa County.

Opinion of the Court — Sanderson, J.

Rooney was, on the 2d day of September, 1863, elected Treasurer of Mariposa County, and the other defendants, nine in number, signed his official bond as sureties, each obligating himself in a different sum. This action was brought on the bond against Rooney and his sureties, to recover the amount of his defalcation. The penal sum of the bond was twenty-five thousand dollars. The judgment of the Court below recited the amount of the defalcation to be one thousand two hundred and thirty-six dollars and thirty-six cents, and then recited the penal sum of the bond, and the amount for which each surety had bound himself, and then a separate judgment was rendered against each surety who had signed for a greater amount than the defalcation, for the full amount of the defalcation and costs, and against each surety who had signed for a less amount than the defalcation, for the amount for which he signed and costs.

The defendants appealed.

Alexander Deering, for Appellants.

Campbell & Burckhalter, for Respondent.

By the Court, SANDERSON, J.

In actions like the present the judgment should first fix the amount of the defalcation or recovery and thereafter proceed with a separate judgment against each of the sureties for the full amount for which he has made himself liable in the bond and costs, and then close with a proviso to the effect that each shall be satisfied by the collection or payment of the amount of the defalcation or recovery and costs. An example is found in the case of *The People v. Love et al.*, 25 Cal. 520. The judgment in this case is not therefore in the proper form and must be modified so as to meet the views here indicated.

Ordered accordingly.

Mr. Justice SAWYER expressed no opinion.

Argument for Appellant.

JOSEPH GRANT v. JOSEPH H. MOORE AND E. J. MOORE.

ORDER GRANTING A NEW TRIAL.—If the Court below makes an order granting a new trial, and for any cause the order was correct, the appellate Court will not set it aside because the reason assigned for it may have been wrong.

MALICIOUS PROSECUTION.—To maintain an action for malicious prosecution, the primary question to be considered is the want of probable cause for the prosecution complained of, and this must be established before plaintiff can recover.

SAME.—From the want of probable cause, malice may be inferred; but from the most express malice want of probable cause cannot be implied.

WANT OF PROBABLE CAUSE IN MALICIOUS PROSECUTION.—In an action for malicious prosecution, the want of probable cause is a mixed question of law and fact.

THE WANT OF PROBABLE CAUSE NOT TO BE SUBMITTED TO A JURY.—In an action for malicious prosecution, it is erroneous for the Court to leave to the jury the decision of the question whether the facts they may find will amount to a want of probable cause.

HOW JURY TO BE INSTRUCTED ON WANT OF PROBABLE CAUSE.—In an action for malicious prosecution, if the facts are doubtful, the Court should instruct the jury that if they find the facts in a certain way, there was no probable cause, and their verdict should be for plaintiff; but if they find in another way, there was probable cause, and their verdict should be for the defendant.

WHEN THERE IS PROBABLE CAUSE.—If, in an action for malicious prosecution, it appears that the defendant had a cause of action in the case alleged to have been maliciously brought, although for a much less amount than claimed, there was probable cause, and the Court should grant a nonsuit.

PLAINTIFF MUST PROVE WANT OF PROBABLE CAUSE.—In an action for malicious prosecution the burden is on the plaintiff to show affirmatively a want of probable cause.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Edward Tompkins, for Appellant.

The Court erred in holding that the question of want of probable cause is a mixed question of law and fact, to be determined by the Court. The mere statement that there are facts to be determined, when there is a jury, settles by whom they are to be decided. It is as exclusively the province of the jury to find the facts as of the Court to determine the law, and the very authorities cited by the Court in its opinion sustain in the fullest manner the law as stated by the Court.

Argument for Appellant.

in its charge to the jury. The charge was right, and the modesty of the Court has made it admit itself in error, when in fact no error had been committed. An examination of the cases will demonstrate this in the fullest manner. These cases are: *Potter v. Seale*, 8 Cal. 220; *Besson v. Southard*, 10 N. Y. 236; *Bulkley v. Smith*, 2 Duer, 260, and *Bulkley v. Kitillas*, 2 Selden, 348. These are the cases, and the whole of them, upon which the Court below has decided that "the want of probable cause is a mixed question of law and fact, to be determined by the Court" — the fact as well as the law — and that "in actions of this nature" the province of the jury is gone. Whether there be conflict in the evidence or not, the Court decides all but the amount of damages. Whether the facts exist that under the law show a want of probable cause is the gist of the whole action. They do, or they do not, and the whole scope and bearing of the cases cited and relied on by the Court below, is that the jury are not only the judges, but the *only* judges of that plain question of fact. If there is no dispute about their existence or their non-existence, then these cases say that the question becomes entirely one of law for the Court, because there is nothing for the jury to decide. Facts that are undisputed do not need a verdict to settle them. In every case the distinction is kept plainly in view between the cases where there is no conflict in the evidence and those in which there is — and in *Potter v. Seale*, the Court go on and dispose of the case upon the express grounds (page 221) that the witnesses are unimpeached, "and there is not the slightest perceptible conflict between them." The Court add: "It is, then, one of the cases where the circumstances are clearly established; and the only question to determine is, whether these circumstances, in themselves, constitute probable cause."

In the case of *Masten v. Deyo*, 2 Wendell, 427, Mr. Justice Marcy has anticipated the question here. He says: "It is conceded on all hands that the question of probable cause is a mixed question of law and fact; and it would seem necessarily to result that the jury are to say whether the circumstances

Argument for Respondents.

relied on to show probable cause really existed, and the Court are to decide, if they did exist, whether they constituted probable cause. A Judge, therefore, who should assume the right to determine the whole question, to the exclusion of the jury, would encroach upon their province."

After stating that in that case, as here, it was contended by the defendant that the Judge and not the jury is to determine the question of probable cause, he proceeds: "It being, as all admit, a mixed question of law and fact, this general denial of the right of the jury to participate in its decision would establish an exception to that great and salutary principle that lies at the foundation of the right of trial by jury—*ad quæstiones facti, non respondent iudices; ad quæstiones legis, non respondent juratores.*"

If it was admitted that any such technical rule existed elsewhere as is claimed by the respondents, is there any reason why it should be introduced here? The policy of the law is to keep all its proceedings as simple and uniform as possible. Our Constitution and Practice Act manifestly aimed at the entire separation of the provinces of Court and jury. The former is not even to charge the latter upon questions of fact. If it states the testimony, (Practice Act, Sec. 195,) so jealously is the distinction guarded, that it is required at the same time to "inform the jury that they are the *exclusive* judges of *all* questions of fact." Where is the authority, and if it existed, where would be the wisdom, in grafting on a judicial amendment to the statute, so that it should read, "except in actions for malicious prosecution, and then the Court shall decide both the law and the fact?"

D. S. Wilson, and *S. M. Wilson*, for Respondents, argued that the Court erred in leaving the question of probable cause for the prosecution of the attachment suit to the jury, and cited *Potter v. Seale*, 8 Cal. 220; *Bulkley v. Smith*, 2 Duer, 272; *Besson v. Southard*, 10 N. Y. 236; *Mums v. Dupont*, 1 American Leading Cases, 209; and *Savage v. Brewer*, 16 Pick. 453. They also argued that the proof of the three hundred

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and thirty-nine dollars due, defeated the action, because there was not only "probable cause," but *actual* cause of action; and that if plaintiff intended relying on excessive attachment, he should have made that his cause of action, and that it was a necessary fact that the suit must have been ended and determined in *favor* of the plaintiff; that here it was decided *against* plaintiff, so far as cause existed at the time of the bringing of the suit; and cited *Vanderbilt v. Mathias*, 5 Duer, 307; *Gorton v. De Angelis*, 6 Wend. 420; and *Feazle v. Simpson*, 1 Scammon, 30.

By the Court, CURREY, C. J.

The complaint in this action is in the usual form for malicious prosecution. Its material allegations were traversed by the defendants' answer. The cause was tried by a jury, and a verdict of five thousand dollars was rendered for the plaintiff against the defendants, on which judgment was entered. The defendants thereupon applied for a new trial, which the Court by order granted. From this order the plaintiff has appealed. The motion for a new trial was based on several distinct grounds. The reason which the Judge assigned for making the order was that the Court erred in submitting to the jury the question of "want of probable cause" for the prosecution of the action, which the plaintiff alleged in his complaint was without probable cause and malicious.

The appellants' position is that the Court erred in granting the order appealed from, on the ground assigned therefor, and reference is made to authorities bearing on the subject, to show that the charge to the jury on the point was proper, and that the reason given for granting a new trial was not well founded, but in itself erroneous. Were we of the opinion the Court was in error in respect to the exact question on which the order was made, we would not be justified in reversing it, provided there was any other ground on which the order should have been made. If for any cause the verdict and judgment ought to have been set aside and a new trial granted, the order

should be allowed to stand, whether the reason assigned for it was right or wrong. To hold otherwise would be to deprive the defendants of a right to which, if error intervened, they were entitled *ex debito justitiæ*.

The action which the plaintiff alleges in his complaint was prosecuted against him by the defendants maliciously and without probable cause, was an action of assumpsit, brought by the defendant Joseph H. Moore against the plaintiff Joseph Grant, in the District Court of the Twelfth Judicial District, on the 30th of October, 1863, for the recovery of twenty-one hundred and fifty dollars, with interest thereon from the 15th of August then last past. Moore's complaint was duly verified. At the time the action was commenced a writ of attachment was sued out, and placed in the hands of the Sheriff, who on the same day attached a fire-proof safe, the property of Grant, and on the day following attached certain shares of stock in a gold and silver mining company, supposed to belong to Grant, but which in fact belonged to other persons. Grant, by a verified answer, denied that he owed Moore anything whatever. The cause was referred to and tried by a referee, and the result was that Grant obtained against Moore a judgment for three dollars and twenty-five cents.

Want of probable cause in action for malicious prosecution.

To maintain an action for malicious prosecution, the primary question to be considered is the want of probable cause for the prosecution complained of. From the want of probable cause, malice may be inferred; but from the most express malice the want of probable cause cannot be implied. (*Potter v. Seale*, 8 Cal. 220; *Pangburn v. Bull*, 1 Wend. 352; *Stockly v. Hadridge*, 8 C. & P. 18.)

The learned Judge who tried the case charged the jury that probable cause is a mixed question of law and fact; that where there is no dispute about facts it is the duty of the Court to determine whether there was probable cause for the prosecution or not, and then said: "But, as in this case, where the facts, which were adduced as proof of want of

probable cause, are controverted, conflicting evidence is to be weighed, and the credibility of witnesses is to be passed upon, it is a question for the jury, under the instructions of the Court as to the law, to decide whether or not there was probable cause for the prosecution of the suit by defendants." The jury were then directed to first ascertain and find from the evidence "whether or not the defendants, at the time they commenced the action and procured to be issued therein from the Twelfth District Court an attachment against the property of the plaintiff, had reason to believe the plaintiff was indebted to Joseph H. Moore, defendant, in the sum of twenty-one hundred and fifty dollars." The Judge next instructed the jury that "probable cause is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true;" and also that a want of probable cause could not be inferred from any malice on the part of the defendants towards the plaintiff, if in fact such malice was found to have existed, and thereupon further charged that if the jury should come to the conclusion that probable cause existed for the defendants to commence and prosecute the action of Moore against Grant, or that they were actuated by an honest and reasonable conviction of the justice of the same, the verdict should be for the defendants; but if from the evidence the jury should find the action to have been commenced and the attachment sued out and prosecuted by the defendants without probable cause and maliciously, they should find for the plaintiff.

Want of probable cause a mixed question of law and fact.

It is the familiar language of the authorities on the subject of the action for malicious prosecution that the want of probable cause is a mixed question of law and fact. Mr. Justice Duer, in *Bulkeley v. Smith*, 2 Duer, 271, denominated the phrase "mixed question of law and fact" as deceptive, and observed that Judges, misled by it, are apt to content themselves with defining a probable cause, leaving the jury to decide whether

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the facts of the case correspond with the definition, which he said was, in effect, leaving the whole matter to their determination. In *McCormick v. Sisson*, 7 Cow. 715, the Judge at the Circuit submitted to the jury, upon the evidence, whether there was probable cause. The Supreme Court, by Woodworth, Justice, set aside the verdict, which was for the plaintiff, and granted a new trial, saying: "Whether the circumstances are true is a matter of fact; if true, whether they amount to probable cause is a question of law." In *Pangburn v. Bull*, 1 Wend. 352, the Court below charged the jury that if from the testimony before them they should be of opinion that the prosecutions complained of were malicious and without probable cause, and that the defendant knew the facts to be so before and at the time of such prosecutions, they ought to find damages for the plaintiff, otherwise they should find the defendant not guilty. The Supreme Court held that this was submitting both the law and the fact to the jury, and therefore erroneous. In respect to these two decisions, Mr. Justice Marcy, in *Masten v. Deyo*, 2 Wend. 429, said: "They do not disapprove of submitting such questions to the jury, but they condemn the manner in which they were submitted. They by no means imply that the Court ought to assume the province of the jury and pass upon the facts, in case facts are in dispute, but they disapprove of the surrender by the Court of its own function—the exercise of the right to pronounce the law to the jury." In an earlier portion of the same opinion the learned Judge said: "It is conceded on all hands that the question of probable cause is a mixed question of law and fact; and it would seem necessarily to result that the jury are to say whether the circumstances relied on to show probable cause really existed; and the Court are to decide, if they did exist, whether they constituted probable cause. A Judge, therefore, who should assume the right to determine the whole question to the exclusion of the jury, would encroach upon their province."

In the case cited from 2 Duer, the Court said: "Every rule of law depends for its application upon a given state of facts,

and where the facts upon which it depends are controverted and doubtful, they must, of necessity, be ascertained by the verdict of the jury; but whether the facts are admitted or disputed, it is equally the duty of the Judge to state explicitly to the jury the rule of law arising upon them, by which their verdict ought to be controlled — the only difference being, that in the first case the direction to the jury is positive; in the second, hypothetical."

The jury cannot determine whether the facts found amount to want of probable cause.

The want of probable cause is the gist of an action for malicious prosecution, and must be affirmatively established before the plaintiff can be entitled to recover. Where the case is involved in uncertainty and doubt as to whether the plaintiff's alleged cause of action is made out, the want of probable cause is said to be a mixed question of law and fact. In *Bulkeley v. Keteltas*, 2 Seld. 387, the rule on the subject is stated in these words: "Where there is no dispute about the facts, the question of want of probable cause is for the determination of the Court. Where the facts are controverted or doubtful, whether they are proved or not, belongs to the jury to decide; or, in other words, whether the circumstances alleged are true, is a question of fact; but if true, whether they amount to probable cause, is for the Court." The rule thus stated limits the province of a jury to finding, from the evidence, whether the facts and circumstances alleged are true or not, and necessarily presupposes that if they are true, the action is made out; because, if they be true, and yet do not show a want of probable cause, it could be of no use to submit to the jury to find whether they were true or not, but the jury should be directed to find for the defendant. The true rule we conceive to be found in the following passage of the opinion of Mr. Justice Duer in *Bulkeley v. Smith*: "In an action for malicious prosecution, if the Judge is of the opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit

the plaintiff or instruct the jury to find a verdict for the defendant; but if the facts upon which, in his judgment, the question depends, are rendered doubtful by the evidence, he must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not amount, as the case may be, to a want of probable cause, and consequently will or will not entitle the plaintiff to the verdict which he seeks. If, instead of such direction, he leaves it to the jury to determine, not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he abjures his own functions and commits a fatal error." From these cases it may fairly be inferred to be unnecessary to instruct the jury as to what constitutes probable cause or the want of it.

The doctrine seems to be very generally settled that the question of want of probable cause is a mixed question of law and fact, involving two distinct considerations to be adjudicated by two different branches of the same tribunal at the same time; the sufficiency of the circumstances to constitute a want of probable cause being a mere question of law for the Court, and the evidence of the circumstances being for the consideration of the jury. Where the evidence is in a condition requiring the cause to be submitted to the jury, it is the duty of the Court to instruct them that if they find in a particular way there was no probable cause for the prosecution complained of, and their verdict should be for the plaintiff; but if they find in another way there was probable cause, and their verdict should be for the defendant. (1 Am. Lead. Cases, 218, 4 Ed.)

We now come to the examination of the charge which the Court in granting a new trial conceived to have been erroneous. The Judge defined in general terms what constituted probable cause, and no fault is to be found with the definition given; and he told the jury at the same time that it was a question for them, under the instructions of the Court as to the law, to decide whether or not there was probable cause for the prosecution of the suit by the defendants against Grant.

We think this charge committed to the jury more than it was their legitimate province to determine. In addition to the authorities already cited bearing upon this point, we refer to the facts and the opinion of the Court in *Bulkeley v. Keteltas*. In that case the Judge at the trial charged the jury that it was for them to determine whether the "circumstances proved in evidence do or do not establish a want of probable cause;" and also that it was for the jury to say whether the plaintiff had failed to show the want of probable cause. The Court of Appeals held these instructions to be clearly erroneous, and then said: "The jury are told that it is their province to determine whether the facts and circumstances proved in evidence do or do not establish the want of probable cause. The Judge does not decide whether these facts and circumstances are sufficient or not, provided the jury believe them to be proved, but leaves the whole matter to the determination of the jury. If the Judge had supposed that the truth of the facts, as sworn to, admitted of a doubt, he should have expressed his opinion upon the law arising upon those facts, if proved, and then submitted to the jury the question whether they were credibly proved or not."

The law makes it the duty of the Judge who tries an action for malicious prosecution, to instruct the jury that as they may find and determine certain questions of fact, properly submitted to them, to be true or untrue, so must be their verdict for the plaintiff or for the defendant; not that they should determine the question of the want of probable cause or the contrary. It may sometimes be difficult to state to the jury what the testimony is, and what facts if found to be true establish the plaintiff's allegation of want of probable cause; but difficult as it may be, this duty is cast on the Judge in this kind of actions, because he is presumed to know, much better than the jury can, what facts show the existence of probable cause or the want of it. As the order must be affirmed, and the cause must be tried again, it becomes necessary to notice other questions, which were presented on the application for a new trial, than the one considered.

What constitutes probable cause.

When the plaintiff rested his case at the trial the defendants moved the Court to grant a nonsuit on various grounds. This motion was denied and the defendants excepted. One of the grounds assigned for the motion was that the plaintiff's proofs failed to show want of probable cause for the action of Moore against Grant; that on the contrary it affirmatively appeared that when that action was commenced Grant was indebted to Moore in a considerable sum of money.

The judgment roll in the case of Moore against Grant was given in evidence at the trial by the plaintiff. The referee's report shows that when that action was commenced and the attachment issued there was due from Grant to Moore at least three hundred and thirty-nine dollars and eight cents. Besides this it also appeared that a few days before then the parties had an accounting together respecting certain mining stock transactions, when it was ascertained and mutually agreed between them that Grant owed Moore a balance of something over three thousand dollars, and beyond this the referee found that there was due from Grant to Moore for money loaned the further sum of four hundred and twenty-six dollars; but that subsequently, and before the action was commenced, the amount thus supposed to be due Moore was reduced by money received by him in the sum of twenty-one hundred and seventy-three dollars, leaving due to Moore a supposed balance of thirteen hundred and seventy-eight dollars and fifty cents. After the trial of the cause had progressed for some time before the referee, the parties stipulated to submit to his determination, without reference to the pleadings, all matters in evidence in relation to the accounts as they then stood between the parties, and that judgment should be entered in conformity to the finding of the referee as to the true state of the accounts. The question respecting the true state of the accounts being thus opened for a re-examination, the referee found that in the accounting and settlement mistakes had intervened to the prejudice of Grant, amounting in the aggre-

gate to one thousand and thirty-nine dollars and fifty cents, and that the true balance due Moore at the time on the mining stock transactions was two thousand and eighty-six dollars and eight cents, which with the four hundred and twenty-six dollars also due him, amounted to two thousand five hundred and twelve dollars and eight cents. That this sum was reduced before action brought by commissions and cash received by Moore to three hundred and thirty-nine dollars and eight cents, and that after the action was commenced there was paid on behalf of Grant to Moore the sum of three hundred and forty-two dollars and thirty-three cents. The disposition of the case by the referee, under the stipulation, made Moore debtor to Grant at that date in the sum of three dollars and twenty-five cents; and having so found the facts the referee further reported as follows: "I therefore find, as a conclusion of law, from the foregoing facts, that at the time of the commencement of this action the defendant was justly indebted to the plaintiff in the sum of three hundred and thirty-nine dollars and eight cents, and that the plaintiff is now indebted to the defendant in the sum of three dollars and twenty-five cents, and judgment should be entered accordingly."

There was no evidence showing, or tending to show, that Moore was aware of any mistake in the accounting and settlement had between him and Grant respecting their mining stock transaction; nor that he had any reason to doubt at the time that there was at least thirteen hundred and seventy-eight dollars and fifty cents due him. With all mistakes corrected, it was found by the referee that in fact there was due Moore when the action was brought the sum of three hundred and thirty-nine dollars and eight cents.

Plaintiff must establish want of probable cause.

In an action for malicious prosecution the burden is on the plaintiff to show affirmatively that there was a want of a probable cause. Instead of it so appearing, the evidence on the part of Grant was positive that Moore had a good cause

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of action against him for at least the sum last named. There was no evidence showing that the property belonging to Grant which was attached exceeded in value the amount confessedly due. In truth, the evidence strongly tended to prove that it was not worth that sum. As the case stood at the time the motion for a nonsuit was made, it did not appear that the action of Moore against Grant was without probable cause; but on the contrary, from the undisputed facts in evidence on the part of the plaintiff, the existence of probable cause was shown. The plaintiff's case received no accession of strength from the testimony subsequently adduced, and consequently the error committed by denying the defendant's motion for a nonsuit was not cured.

We think the motion for a nonsuit ought to have been granted, and that having been denied, and the cause submitted to the jury, the Court should have instructed them that as there was no question upon the evidence as to the indebtedness of Grant to Moore at the time the action was brought by Moore against Grant, in the sum of three hundred and thirty-nine dollars and eight cents, the existence of probable cause affirmatively appeared, and consequently the defendants were entitled to a verdict. (*Bulkeley v. Smith*, 2 Duer, 274.)

The order granting a new trial is affirmed.

Mr. Justice SANDERSON expressed no opinion.

By the Court, CURREY, C. J., on petition for rehearing.

In the petition for a rehearing the appellants' counsel takes the ground that the report of the referee finding that when Moore commenced his action against Grant and issued the attachment in that suit there was due from the latter to the former three hundred and thirty-nine dollars and eight cents, was not a finding authorized by the terms of the stipulation. And in support of this it is said that by the stipulation, dated May 6th, 1864, the parties agreed what the referee should pass upon, and that he was to go on and settle all matters in

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which they were mutually interested; and the parties agree that the duty of the referee consisted in finding the actual state of the accounts at the time the stipulation was made, and not the state of the accounts at the commencement of the action of Moore against Grant. Be it so; and it then appears that the finding of the state of the accounts between the parties at the date of the stipulation involved an investigation of their condition when the suit of Moore against Grant was commenced. The report of the referee stated in detail the condition of the accounts between the parties to the suit before him, and showed that Grant was indebted to Moore over three hundred dollars when the attachment was issued. The condition of the account at that time was a matter involved in the investigation and was not open to contradictions on the trial of the suit of Grant against the Moores. If the position of the appellants' counsel, that the referee had nothing to do in determining the issues joined between the parties in the action of Moore against Grant was assumed to be correct, then it would follow as a matter of law that the subject matter of that action has never been determined, and consequently that the action of Grant against the Moores could not be maintained. Before an action for malicious prosecution can be maintained, it must appear that the action alleged to have been prosecuted maliciously and without probable cause was determined in favor of the party injured by it. (*Gorton v. De Angelis*, 6 Wend. 420; *Vanderbelt v. Mathias*, 5 Duer, 307; *McCormick v. Sisson*, 7 Cow. 715.)

The stipulation entered into on the 6th of May, 1864, was in effect that the referee should decide all matters in evidence in relation to the accounts between the parties without reference to the pleadings as they then stood, and that the pleadings should be considered as amended so as to cover the whole case, and that judgment should be entered in conformity to the finding of the referee as to the then true state of the accounts between the parties. The issues joined in the case of Moore against Grant had been referred when the parties

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entered into this stipulation, and by the stipulation matters which were not embraced in that issue were submitted for the decision of the referee. The subject matter of the controversy between the parties was thus enlarged, and to that degree changed, and the judgment reported by the referee was different from what it necessarily could have been had the investigation been confined to the matters originally in issue, assuming that the referee found the facts truly. We are inclined to the opinion that the stipulation so changed the issues between the parties as to render the submission to the referee to ascertain what was the true state of the accounts between them at that time and to report a judgment accordingly, and arbitration of and concerning all matters in difference respecting the accounts between the parties up to that date.

The petition for a rehearing must be denied, and it is so ordered.

Mr. Justice SANDERSON expressed no opinion.

THE PEOPLE v. JAMES WINTERS.

BURGULARIOUS TOOLS AS EVIDENCE.— Burglarious tools, found in the possession of the defendant soon after the commission of the offense, may be offered in evidence by the prosecution whenever they constitute a link in the chain of circumstances which tend to connect the defendant with the particular burglary charged in the indictment.

SAME.— Before burglarious tools can be received in evidence, it must be shown that the burglary charged was in fact committed, and that it was committed with the aid of burglarious tools like those proposed to be shown in evidence, and that the defendant was in the vicinity at or about the time the offense was committed.

A BILL OF EXCEPTIONS MUST SHOW ERROR.— If the record, in an indictment for burglary, only shows an exception to the exhibition of burglarious tools in evidence, the presumption is that all the facts were proved necessary to entitle them to be shown in evidence.

SAME.— Where the admissibility of evidence depends upon the character of other evidence, it will be presumed on appeal that such other evidence was of a character to justify the ruling of the Court below, unless the contrary be clearly shown by the bill of exceptions.

APPEAL from the County Court of the City and County of San Francisco.

The defendant was indicted for burglary. He was convicted, and sentenced to be imprisoned for the term of seven years, and appealed from the judgment.

The other facts are stated in the opinion of the Court.

J. W. Coffroth, for Appellant.

The proof introduced by the District Attorney had no bearing upon the crime charged, to wit: burglary. It would have been good upon a charge of having burglarious instruments in possession, under the one hundred and twenty-seventh section of the Act concerning crimes and punishments. The State sought to convict the defendant by proof of his commission of another crime which is not mentioned in the indictment. (*People v. Garnett*, ante, 622.) This doctrine is ably and fully declared in *People v. Kennedy*, 32 N. Y. 141-145.

J. G. McCullough, Attorney-General, for the People, cited *People v. Frank*, 28 Cal. 507; *People v. Larned*, 7 N. Y. 452; *Commonwealth v. Williams*, 2 Cushing, 585; *United States v. Burns*, 5 McLean, 26; and 3 Greenleaf on Ev., Secs. 15-19.

By the Court, SANDERSON, J.

The only question presented by the bill of exceptions in this case relates to the admission and exhibition as evidence to the jury of certain burglarious tools which were found in the defendant's carpet bag at the time of his arrest.

Burglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged in the indictment. But before they can be received it must be shown that the burglary charged was in fact committed. When this has been done nothing remains but to ascertain who was the guilty party; or in other words to connect the defendant with the burglary thus established. It rarely happens that this can be

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done by the direct evidence of witnesses who saw and recognized the defendant in the act; hence in a majority of cases a resort must be had to circumstantial evidence, and any circumstances of which it can be reasonably affirmed that they form links in a chain which tends to connect the defendant with the commission of the burglary are competent evidence against him; but circumstances of which this cannot be affirmed are not. Hence the possession of burglarious tools at or about the time the burglary was committed may or may not be a material fact and competent for the prosecution to prove, and whether it is or not depends necessarily upon the other circumstances of the case. In order to render it material there must be a possible and probable connection between it and the other circumstances given in evidence. If it appears from the other evidence in the case that the defendant was in the vicinity at or about the time the burglary was committed and that it was committed by the aid of burglarious tools, the possession by the defendant, at or about that time, of corresponding tools may be shown, because by such evidence it is shown that the defendant had the means to commit the offense in the mode in which it was committed and because the possession of the means by which the offense was actually committed is a circumstance which tends when other circumstances do not oppose but agree with it, to connect the accused with the commission of the offense. But if it appears from other evidence that the burglary was not committed by means of burglarious tools, as where the burglar has entered by an open door or window, the possession of burglarious tools cannot be shown; because, so far as the case shows, there is no connection, probable or possible, between it and an offense confessedly committed without the aid of such tools.

In the present case the record fails to show satisfactorily by what means the entry into the house of the prosecutor was effected. The record seems to have been made upon the theory that the rule was universal that the possession of burglarious tools may be shown in every prosecution for burglary or that it cannot, and that the competency of such evidence

is not to be determined by the particular circumstances of the case, but entirely by the legal character of the offense charged. If the burglary was in fact committed by the aid of tools or instruments corresponding to those found in the defendant's possession, then the latter, as we have seen, were properly admitted in evidence and exhibited to the jury as the most satisfactory method of proving means corresponding to those actually used in the commission of the offense to have been in the possession of the defendant at or about the time the offense was committed. But if, in fact, the burglary was not committed by such means, then they were not properly admitted because they in no way tended to connect the defendant with the burglary in question. But, as already stated, what the facts in this respect really were we are unable to satisfactorily determine from the record. In such a case we are bound to presume that the facts were consistent with the ruling of the Court, for the party who alleges error must show it. All the presumptions of law are against him.

Judgment affirmed.

**J. W. BRUMMAGIM, ADMINISTRATOR OF THE ESTATE OF
AMELIA MOSS, DECEASED, v. J. C. SPENCER.**

FORCIBLE ENTRY AND DETAINER.—The general terms, "actions of forcible entry and detainer," as employed in the Constitution of this State, include
✓ actions for the unlawful holding over by tenants.

DEMAND BY LANDLORD ON TENANT WHO FAILS TO PAY RENT.—If a tenant holds over after rent has become due and remains unpaid for the space of three days, a demand by the landlord of the payment of rent and delivery of possession, both made at the same time, will enable him to maintain an action for unlawful holding over. It is not necessary to demand rent, and wait three days, and then demand possession.

APPEAL from the County Court, Sacramento County.

The plaintiff sued, in the County Court, as administrator with the will annexed of the estate of Amelia Moss, deceased, and alleged in the complaint that his testatrix on the 2d day

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of January, 1865, leased to the defendant a house and lot in the City of Sacramento, and that defendant agreed to pay her therefor eighteen dollars per month, payable on the second day of each month, in advance, and that defendant had failed to pay the rent which fell due on the 2d days of July, August, September, October, and November, and that on the 7th day of November, 1865, he demanded of defendant, in writing, that he deliver him possession of the house and lot, and that he pay the rent then due. It was also averred that plaintiff's testatrix departed this life April 7th, 1865.

The defendant demurred to the complaint, because the Court had no jurisdiction of the subject matter of the action, it being an action for the recovery of the possession of real property, and because a demand for possession of the demised premises was not made three days after the demand for payment of the rent.

The Court sustained the demurrer, and the plaintiff declining to amend, gave judgment for defendant. Plaintiff appealed from the judgment.

Charles A. Tuttle, for Appellant.

Robinson & Dunlap, for Respondent.

By the Court, RHODES, J.

The first ground of the defendant's demurrer is fully answered by the case of *Caulfield v. Stevens*, 28 Cal. 118. In that case we held that the general terms — "actions of forcible entry and detainer" — as employed in the Constitution of this State, included actions for the unlawful holding over by tenants, and that jurisdiction of those actions was committed by the Constitution to the County Courts.

The only remaining ground that requires attention, is that the plaintiff does not allege a demand of the rent, previous to the making of the demand for the surrender of the possession of the premises. The Act of 1863, concerning forcible entries and unlawful detainers, (Stats. 1863, p. 562) differs in some

respects from the earlier Acts upon the same subject. Under those Acts, it was requisite to make a demand of the rent, and, after the expiration of three days, the rent remaining unpaid, to demand the delivery of the possession of the premises, and the failure of the tenant to pay the rent within three days after the demand of the possession of the premises, worked a forfeiture of the estate of the tenant. By the amendatory Act of 1862 (Stats. 1862, p. 420) a clause was added to section thirteen, the object of which was to avoid the strictness required at common law, as to the time and place of making the demand of rent, and the amount of rent to be demanded, in order to work a forfeiture; but it was still necessary to demand the rent, and after the expiration of three days therefrom, to demand the possession, and the tenant then had three days further time in which to pay the rent, to save the forfeiture.

The third section of the Act of 1863 declares it to be unlawful for the tenant to hold over the lands after any rent has become due and remains unpaid for the space of three days; and section four prescribes that if the landlord shall make a demand in writing of the tenant after the rent has become due, that he deliver the possession of the premises, and the tenant shall refuse or neglect for the space of three days to pay the rent or quit the possession, the tenant "shall be deemed guilty of an unlawful detainer." The intent of the statute, as gathered from sections three and four, in case of non-payment of rent, was to make the failure of the tenant to pay the rent within the space of three days after a demand of the possession of the leased premises, because of the rent being unpaid, operate as a forfeiture of the estate of the tenant. The declaration of the statute, that in such case the tenant shall be deemed guilty of an unlawful detainer, necessarily implies a forfeiture of his estate in the leased premises. Neither of those sections require that a demand of the rent shall be made previous to the demand of the possession of the premises.

The Act of 1863, after having provided for a forfeiture, as we have seen, retained the clause we have mentioned as added

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to section thirteen by the amendatory Act of 1862, and it forms section five of the Act of 1863. Without that section, there would be no difficulty in holding that a demand of the rent was unnecessary; but the section must be read in connection with the other sections bearing upon the same subject matter, and be so construed, if possible, as to make the several provisions harmonize, and avoid a seeming inconsistency. Unless the section is disregarded entirely, we must hold that the rent should be demanded, for the provision that it shall not be necessary, in order to work a forfeiture, to make the demand on the day the rent becomes due, but that it may be made at any time within a year thereafter, and for the amount then due and unpaid, and that it may be made of the tenant in person elsewhere than on the premises, necessarily implies that a demand of the rent must be made before the landlord can proceed against the tenant as for a forfeiture. The demand of the rent must accompany or precede the demand of the possession. It would be useless after that time, for the tenant is required to pay the rent within the three days ensuing the demand of the possession, in order to save the forfeiture. We cannot hold that it must precede the demand of the possession either three days, as contended for by the defendant, or any other time, for the statute has not so provided, either expressly or by implication. We are, therefore, of the opinion that a demand of the rent, made at the time of making the demand of the possession of the premises, is a sufficient compliance with the requirements of the statute.

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer.

JACOB P. LEESE v. WILLIAM S. CLARK *et als.*

ORDER TO COMPEL SHERIFF TO EXECUTE WRIT OF RESTITUTION.—At the hearing, under an order for the Sheriff to show cause why an order should not be made requiring him to proceed and execute a writ of *habere facias possessionem*, the burden is cast upon the Sheriff of establishing affirmatively

Argument for Respondent.

the matters which he alleges as an excuse for refusing to serve the writ. (*Fogarty v. Sparks*, 22 Cal. 142, referred to in this connection.)

AFFIDAVITS USED ON A MOTION.—At the hearing of a motion tried on affidavits, if a copy of a deed under the control of the party relying upon it, to which there is a subscribing witness, is attached to an affidavit, and the party presenting the affidavit refuses to produce the original deed upon the demand of his adversary, and shows no excuse therefor, the copy of the deed is entitled to no weight as evidence.

WHO SHOULD BE REMOVED UNDER A WRIT OF POSSESSION.—*Prima facie*, all who come into possession of land after an action is brought to recover possession of it must go out, if the plaintiff recover and a writ of *habere factas possessionem* is issued, for the presumption is, nothing appearing to the contrary, that they came in under the defendant.

EFFECT OF SERVICE OF WRIT OF RESTITUTION.—A person found in possession of land, and turned out under a writ of *habere factas possessionem*, if he was not a party to the suit, is not prejudiced in his title, if he has any antedating the suit.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The case of *Leese v. William S. Clark*, in which the writ of possession referred to in this case was issued, will be found reported in 18 Cal. 535; 20 Id. 387; and 28 Id. 26. After the decision reported in the 28 Cal., the remittitur was filed in the Court below, and a writ of possession was placed in the hands of Henry L. Davis, the Sheriff of the City and County of San Francisco.

The other facts are stated in the opinion of the Court.

B. S. Brooks, for Appellant, argued that the facts showed that William S. Clark and John Clark were colluding together to defraud plaintiff of the fruits of his judgment.

Clarke & Carpentier, for Respondent, argued that the facts showed that neither John Clark or his tenants were holding under or in privity with William S. Clark, and that they were in possession before the commencement of the suit, and that they were not bound by the judgment, and cited *Fogarty v. Sparks*, 22 Cal. 142.

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By the Court, SAWYER, J.

Judgment for possession of a lot in San Francisco having been recovered by plaintiff after a litigation extending through a period of about eight years, a writ of possession was placed in the hands of the Sheriff to be executed. The Sheriff found some parties in possession claiming to be tenants of John Clark, a brother of defendant, William S. Clark. Neither John Clark, nor the parties in possession at the time the Sheriff went to execute the writ, claiming to be his tenants, were parties to the action. Upon a claim being made that John Clark was in possession at the time of the commencement of the suit, the Sheriff declined to execute the writ. The plaintiff, upon affidavit filed, obtained an order upon the Sheriff to show cause why an order should not be made requiring him to proceed according to the exigencies of the writ. Affidavits were filed on the part of the Sheriff, and counter affidavits on the part of the plaintiff upon the question of the possession and title of John Clark at the time of the commencement of the suit, and the Court, after consideration of the matter, held that sufficient cause had been shown, and discharged the order. The appeal is from the order discharging said order to show cause.

Sheriff must show affirmatively an excuse for not serving a writ.

Upon the hearing under the order to show cause, the burden of showing that the parties now in possession, or those under whom they claim, were in possession at the time of the institution of the suit in which the writ issued was upon the Sheriff. The Court below seems to have been of a different opinion, and there are some expressions in the case of *Fogarty v. Sparks*, 22 Cal. 142, that tend to give countenance to that view, but we think the correct rule to be as stated.

The question arises between the plaintiff and the Sheriff. The plaintiff has a judgment for possession, and the writ directs the Sheriff to put the plaintiff in possession of the premises. Upon the face of the writ no exception is made.

Having failed to obey its commands, the Sheriff is called upon to show cause; and for cause alleges, upon information and belief, that the parties in possession were in possession at the time of the institution of the suit, and, not having been made parties, that they are not affected by the judgment. The matter of excuse is affirmative matter, and must be affirmatively established by the party averring it.

Proof as to being in possession before suit commenced.

We come now to the question: Was it shown by proof reasonably satisfactory, that the parties in possession, or those under whom they entered, were in possession at the time of the commencement of the suit? The inquiry is only for the purpose of ascertaining whether the parties stand in such a relation to the land that they must go out under the writ. The ultimate title or rights of the parties are not to be determined in this proceeding. The hearing was upon the record and affidavits, and the affidavits are all in the transcript. John Clark is not a formal party to the motion, but the party claiming to be his agent, and several others in possession claiming to be his tenants, make the affidavits on behalf of the Sheriff, and the proceeding is evidently carried on in the name of the officer by the parties in interest. The suit in which the writ issued was commenced August 6, 1858. On the 11th of February, 1861—some two and a half years afterward—the defendant, William S. Clark, executed a conveyance of the premises in question to said John Clark, which deed was recorded on the 24th of May of the same year. Thomas Drum, F. Putzman and John Eden state in their affidavits that they are now and have been for some years in possession of the premises as tenants of John Clark, paying rent to him through his agent; but neither of them pretends that he was in possession, nor does it appear that any person now occupying the premises was in possession at or prior to the date of the said deed from William S. to John Clark, February 11th, 1861: Nor do they profess to know anything about the possession at the date of the commencement of the

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action. These affidavits, therefore, shed no light on the question, as they are entirely consistent with the conveyance of February 11th, 1861, and with the theory of the plaintiff that these parties entered under it.

The only evidence tending in any respect to show that John Clark was in possession at the time of the commencement of the action is the affidavit of Abner Sedgley, and that in very general terms states his conclusions rather than facts, and is vague and evasive to such a degree as to entitle it to but little consideration, especially when taken in connection with evidence appearing in the record of a rebutting tendency. John Clark was not in the State at the time of the commencement of the suit, and, so far as shown in the record, he has never been in the State. He was, consequently, not personally in possession at any time. But Sedgley states, substantially, that prior to August 1st, 1858, while defendant, William S. Clark, was in possession, John Clark authorized and directed deponent (Sedgley) to receive, as his agent, from said William S. Clark, a deed for and possession under and through the same of the premises in question, and that on said first day of August, 1858, (six days before the commencement of the suit,) said William S. Clark executed and delivered to deponent for, and as the agent of John Clark, a deed of conveyance of said premises, and on the same day went with deponent and placed him in possession as the agent of said John Clark; and that from said first day of August, 1858, up to the present time, the said John Clark, by and through his agents and tenants, has continually been in possession. A copy of the alleged deed, not acknowledged or recorded, but purporting to be witnessed by a well known party who resides in San Francisco, and can at all times be readily produced as a witness when required, was annexed to the affidavit. It does not appear whether the alleged authority was in writing or not; but as John Clark was never in the State, it probably was, if any such existed. The plaintiff's counsel objected to the reading of the said copy annexed to the affidavit on the ground that it is incompetent, and that the

original should be produced and proved by the subscribing witness. Also to the affidavit as evidence of authority to receive the deed and possession on behalf of John Clark without producing the power of attorney. The Court then ordered the hearing to be suspended till two o'clock to enable the opposing party to produce the deed, subscribing witness and power of attorney. At the appointed hour said party, by his attorney, "refused to produce either the said original deed or subscribing witness thereto, or the power from John Clark to Sedgley." The affidavit was then read under objection and exception on the part of plaintiff, and this ruling is assigned as error. The hearing was on affidavits, and we cannot say that the Court was authorized to strike out any part of the affidavit. But clearly the copy of the deed, under the circumstances disclosed, is entitled to no weight whatever, and the refusal to produce the original when called upon to do so, without any excuse whatever, tends strongly to weaken the statement in the affidavit relating to it. If any such deed existed it must have been under the control of Sedgley, or he could not have furnished a copy. It is a remarkable circumstance that such a deed should have been made just six days before the commencement of the suit, and have remained unproved and unrecorded during the protracted litigation of eight years between plaintiff and William S. Clark, the brother of the grantee, while another conveyance of the same land made by the same William S. to the same John Clark, executed several years after, should have been promptly recorded. And it is still more remarkable, that a copy should be put forward, and the original withheld when called for, where a matter of so much importance to the grantee was in issue. These circumstances must be regarded as highly significant.

On the question of title and possession, the said William S. Clark, on various occasions subsequent to the 6th day of August, 1858, in judicial proceedings, in answers and affidavits filed in this suit, and in another suit relating to the same subject matter, deposed under oath that he was both seized,

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and, that he was in the possession of the lands in question at, and subsequent to, the time of the commencement of this suit, and in other affidavits that he sold his interest therein on the 11th day of February, 1861, and delivered possession to the purchasers, evidently in said affidavits referring to the said conveyance of that date to said John Clark. So also affidavits of a similar tenor were made in the course of those proceedings by other parties, and they were introduced by the plaintiff on the hearing. These numerous affidavits are plainly inconsistent with any possession in John Clark during those times. The affidavit of Sedgley does not give the names of any of the tenants who occupied under said John Clark, or particular facts relating to possession in any form which would enable the plaintiff to controvert them, but it deals in loose and general terms, and in the quaint but expressive language of Lord Coke, "fraud lurketh in generalities." There may be no fraud, but if not, it is the misfortune of the claimant, that his facts are not more distinctly presented. Sedgley also states, that, "on said first day of August, 1858, deponent caused an occupant previously under said William S. Clark, then having certain goods stored upon and using a portion of said premises, to be notified of such change of ownership." There was, then, on that day an occupant of the premises under William S. Clark, but he does not inform us who he was. He was not turned out of possession, but "notified of said change of ownership" and thereby became the tenant of John Clark. On the sixth this suit was commenced, and James Spear and many others were made defendants. William S. Clark answered, admitting his possession, and Spear answered admitting his possession, and claiming to be rightfully in possession as tenant of William S. Clark. Mr. Sedgley says there was an occupant on the first, who was notified of the change of title. Was it Spear, who was thus notified, and who thereby became the tenant of John Clark? If so, he was served. If not Spear, why not say so? Sedgley does not negative the idea that it was Spear, or inform us who the occupant was, and there is reason to believe from other evidence that Spear

was the man. Clearly John Clark was not personally in possession on the 6th of August, 1858, nor is the name of any tenant given who is claimed to have been in possession on that day — nor is any fact distinctly stated from which we can see that anybody named not a party to the suit and served, was actually in possession under John Clark on that day, while the whole course of the proceedings in the suit, and other facts and evidence appearing in the record, are inconsistent with the idea of any possession by him or on his behalf at the date of the commencement of the action. A more minute analysis of the affidavit of Sedgley and comparison with other portions of the record might be made, but, without pursuing the subject further, it is sufficient to say, that it is loose, vague and evasive, stating inferences rather than facts, and entirely unsatisfactory, while it is inconsistent with much that otherwise appears in the record.

Who must go out on service of writ of habere facias possessionem.

All the parties shown by the record to have been in possession at the date of the issuing of the writ entered long after the commencement of the suit, and, as we said in *Long v. Neville*, “*prima facie* all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant.” This presumption is not overthrown by showing that they came in as tenants of John Clark, without showing affirmatively that John Clark also came in before suit brought, or at least that he has come in under a title adverse to that of the plaintiff, not in collusion with him, and under such circumstances as would entitle him to the protection of the Court, on a proper application, against the writ. There is nothing here inconsistent with the case of *Watson v. Dowling*, 26 Cal. 125, cited by the Court below. In that case, Dowling’s interest in the premises had been sold under execution, and the plaintiff claimed under the Sheriff’s sale. He took such interest as Dowling had, which was only an undivided third, Dowling being tenant in common with other parties. Under

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the writ issued, not only Dowling, but his co-tenant was dispossessed, and the co-tenant applied to be restored to the possession of his undivided interest, and on the hearing of the motion his title was clearly shown, and it antedated the Sheriff's sale and commencement of the suit to eject Dowling. The Court, by virtue of its authority to control its process, restored the co-tenant to the possession. But in this case no legal evidence of any kind has been presented to show an adverse title in the occupants, or in John Clark, under whom they claim, antedating the institution of the suit, while it is admitted that John Clark received and put on record a conveyance from the defendant William S. Clark, made long subsequent to the commencement of the suit. It is true, that an explanation is attempted to be given of the objects for which this deed was given, but this explanation, when taken in connection with other evidence tending to show that the reason given had no foundation in fact, and with other suspicious facts in the case, is entirely unsatisfactory.

It seems apparent to us from the record as now presented, that this is a bald attempt, not by the Sheriff, who is only the nominal party to this proceeding, and is acting in such a manner only as to protect himself, but by the party who has been so long litigating the suit in collusion with the present claimant, to deprive the plaintiff of the fruits of his judgment. If this be not so, the proper evidence of the claimant's rights has been withheld, and they must be vindicated and his good faith shown in a proper suit. His title, if he has any antedating the commencement of the suit, will not be prejudiced by this proceeding. But however this may be, the fruits of a successful litigation cannot be wrested from the prevailing party, and the process of the Courts evaded upon a mere claim set up under suspicious circumstances, resting upon affidavits alone, unless the case made by that kind of proof is reasonably satisfactory.

On the case as now presented we are clearly of the opinion that no sufficient cause was shown for not executing the pro-

Points decided.

cess of the Court, and that the order appealed from is erroneous.

Order discharging the order to show cause reversed, and the District Court directed to enter an order directing the Sheriff to execute its process.

J. H. COGHILL & CO. v. SAMUEL MARKS, AND JOHN GROSS, ASSIGNEE OF ROBT. MARKS, INTERVENOR.

RIGHT TO INTERVENE IN A SUIT WHERE PROPERTY IS ATTACHED.—Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims.

EVIDENCE TO SHOW RIGHT TO INTERVENE.—Where a subsequent attaching creditor intervenes in the suit between a prior attaching creditor and the common debtor, and no question is raised as to the honesty of his debt, his judgment against the common debtor is admissible in evidence to show that the common debtor owed him, and is decisive of the question.

POSTPONEMENT OF LIEN OF PRIOR ATTACHMENT ON GROUND OF FRAUD.—Where a subsequent attaching creditor intervenes to set aside a prior attachment on the ground of fraud, if the Court finds that a portion only of the debt on which the prior attachment issued was fraudulent, the lien of the prior attachment should be postponed only as to that portion of the debt which was fraudulent.

COMMENCING AN ATTACHMENT SUIT BEFORE DEBT IS DUE.—If the debt on which an attachment was issued was not due when the suit was commenced, a subsequent attaching creditor cannot by intervention postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action.

NEW TRIAL ON GROUND OF SURPRISE.—Where a defendant, whose property has been attached, files an evasive answer under oath, which admits the indebtedness sued on, and then, on a trial between an intervenor, a subsequent attaching creditor, and the plaintiff, without intimating that he would do so, testifies that the debt was not due, it is sufficient cause for a new trial on the ground of surprise.

ORDER GRANTING A NEW TRIAL.—An order granting a new trial does not stand or fall upon the reasons which the Court making the order assigned for it, but upon all the facts in the record.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

Statement of Facts.

J. H. Coghill & Co. commenced an action against Samuel Marks to recover judgment for nine hundred and eleven dollars and sixty-four cents, for goods, wares, and merchandise alleged to have been sold by them to the defendant, and procured an attachment to issue, by virtue of which the defendant's property was attached. Afterwards Robert Marks commenced an action against the same defendant, and attached the same property, and recovered judgment by default for eleven hundred and ninety-one dollars and ninety-three cents. The defendant filed an evasive answer under oath in the case of Coghill & Co., admitting the indebtedness charged in the complaint. Robert Marks assigned his judgment to John Gross. When the case of Coghill & Co. was called for trial the Court on motion of plaintiffs struck out the answer and ordered judgment for plaintiffs, when Gross moved the Court to set aside the order for judgment and for leave to intervene. The Court granted the motion, and Gross filed a petition of intervention, alleging that the attachment of Coghill & Co. was fraudulently levied with the design of injuring Samuel Marks' credit, and that it was procured upon a false affidavit, and that in truth the defendant did not owe Coghill & Co. but four hundred and twenty-five dollars when their suit was commenced. On the trial in the intervention case, Gross, to prove that he was a creditor of Samuel Marks, offered in evidence the judgment and judgment roll in the case of *Robert Marks v. Samuel Marks*. The plaintiff objected on the ground that as between the plaintiffs and intervenor the judgment was not competent evidence of indebtedness from Samuel to Robert Marks. The Court overruled the objection. The intervenor offered no other evidence of the indebtedness from Samuel Marks to Robert Marks.

The Court found as a fact that the plaintiffs had under attachment sufficient of Samuel Marks' property to pay their debt, and gave plaintiff judgment against him for nine hundred and eleven dollars and sixty-four cents, but also found that at the time plaintiffs commenced their action part of their demand, to wit: four hundred and sixty-five dollars and

Argument for Appellant.

eighty-five cents, was not due, because a credit of sixty days had been given for the goods, and the credit had not yet expired as to that amount, and for that reason adjudged that the intervenor was entitled to have his judgment first satisfied out of the goods attached.

On motion of plaintiffs, the Court granted a new trial, and assigned as a reason therefor that it had erred in admitting in evidence the judgment of Robert Marks against Samuel Marks.

The intervenor appealed from the order granting a new trial.

Tyler & Cobb, for Appellant.

Section one hundred and ninety-six of the Civil Practice Act, as amended in 1863, requires the Court or Judge, in granting or refusing a new trial, to "state in writing the grounds upon which the same is granted or refused."

The unquestionable object of this amendment, as well as the several late amendments to section one hundred and ninety-five, Practice Act, is to compel the Courts below and suitors to specify fully the errors for which an appeal might be taken, and which, if taken, should be alone examined in the appellate Court. (25 Cal. 59, *Walls, Administrator v. Preston*; *Ib.* 478, *Hutton v. Reed et al.*)

In the case at bar the District Judge, desiring to conform to the requirements of section one hundred and ninety-six, states in writing his grounds for granting a new trial in the case. Taking this view, the appellant contends that the only question open for examination upon this appeal is, whether the Court erred in granting a new trial upon the grounds named.

No point was made as to the regularity of the judgment of *Robert Marks v. Samuel Marks*, but the objection went to the effect of the same as *prima facie* evidence. The intervenor never pretended that the plaintiffs might not attack the judgment in question upon any proper ground. The intervenor ought to prove his allegation that he was a judgment creditor.

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In the case at bar the intervenor by virtue of his judgment claimed a lien upon the attached property prior to, and to the exclusion of the plaintiffs. Both were creditors seeking their rights. "When the contest is between creditors," says Mr. Justice Burnett, in *Dixey v. Pollock*, 8 Cal. 573, "all the equities are in favor of the most diligent. The subsequent execution or attachment creditor can claim no equitable relief. If the proceedings of the prior creditor are not void but voidable, the defendant can alone object. (9 Miss. 397; 21 Bailey, 214.)" In *Dixey v. Pollock* one creditor claimed that another creditor, who had attached before him, but whose proceedings were irregular in procuring the attachment, should be postponed to him on account of the irregularity. But the Court held otherwise, and used the language above quoted.

J. B. Hall, for Respondents.

It has been said by this Court in more than one case that a judgment which is right should not be disturbed, although based upon wrong reasons. The District Judge did not express an opinion upon more than one ground; but his silence as to others does not declare or render them non-existent or unsound in fact or law. (*Oullahan v. Starbuck*, 21 Cal. 413.)

It was error to set aside plaintiff's attachment and lien for their entire demand, when there was the sum of four hundred and twenty-five dollars, part thereof, confessedly due at the time of commencing action. The complaint of intervention itself admitted so much to be legally due, and properly sued for. The only case that at all supports the principle of this part of the judgment is *Taaffe v. Josephson*, overruled on this point in *Patrick v. Montader*, 13 Cal., and *Gamble v. Voll*, 15 Cal.

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It was a matter of no consequence to the respondent whether the judgment against Marks, assigned to the intervenor, was fraudulent or not, inasmuch as the attachment lien of the

respondent was older than the lien of the intervenor; and for the same reason it was unnecessary to inquire how much was due upon the judgment. The judgment was given in evidence simply for the purpose of showing that the relation of creditor and debtor existed between Samuel Marks and Robert Marks, and that Gross had succeeded to his rights by assignment. The proof of the judgment, coupled with the assignment of it, put Gross in a position to intervene in the action under the statutes; and as there was no allegation in the answer to the intervention, charging that the judgment had been got up merely for the purpose of masking an intervention in the suit of the plaintiffs against the common debtor, we consider the proof was decisive. The Court, however, considered that it had erred in admitting it at all, and on that ground granted a new trial on the plaintiff's motion.

If there was nothing in the record upon which the order could be maintained, except the mistaken ground upon which the Court put it, we could not do otherwise than reverse the order and affirm the judgment. But there are other grounds. The defendant in the suit not having answered, the plaintiffs had judgment against him for nine hundred and eleven dollars and sixty-four cents. Under the issue taken on the intervention, the Court found, however, that as to four hundred and sixty-five dollars and eighty-five cents, parcel thereof, the action had been brought prematurely; but the Court has not found that the plaintiffs were guilty of any fraud in that particular, and the whole tendency of the evidence is the other way. But the Court, instead of reducing the prior lien of the plaintiff to the amount which was due at the date of their attachment, postponed it altogether to the subsequent lien of the intervenor, directing the judgment of the latter to be first paid out of the proceeds of the property, which was erroneous. We consider also that the plaintiffs were entitled to a new trial on the ground of surprise.

The objection urged by the appellant that the order granting a new trial must stand, if at all, upon the ground on which the Court below put it, is not well taken. The one hundred

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and ninety-sixth section of the Practice Act provides that "the Court or Judge granting or refusing a new trial shall state in writing the grounds upon which the same is granted or refused;" and that is all that is said upon the matter. If it was intended to so limit the power of this Court in error that in reviewing the orders and judgments of District Courts it could do no more than review the reasons given for entering or rendering them, the Legislature has signally failed to express the intention. A rule of that kind would be both anomalous and improvident. Anomalous, for it would put us upon reviewing judicial arguments rather than judicial action; and improvident, inasmuch as rights would not unfrequently be lost for no better reason than that they had been adjudged to be such upon wrong grounds.

It is urged that we have frequently decided that parties moving for new trials must be confined to the error assigned. But in that class of cases, if the specification does not include all the grounds of reversal embodied in the statement, the fault is that of the moving party. But where the Court properly grants a new trial, but for a false reason, or grants it without exhausting the argument in favor of it, neither the mistake in the one case nor the omission in the other lies at the door of the party — and thus the analogy relied on fails.

The order appealed from is affirmed.

THE PEOPLE v. DAVID HARRIS.

VOTING TWICE.—The act of voting more than once at the same election is not a crime unless done knowingly and with wrong intent.

PROOF OF INTENT TO DO WRONG.—The intent with which an unlawful act was done must be proved; but when an unlawful act is proved to have been done by the accused, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant.

PROOF OF DRUNKENNESS IN A CRIMINAL CASE.—A defendant charged with the commission of a crime may introduce evidence to show that he was intoxicated at the time he committed the act, not as an excuse for the crime, but to enable the jury to determine whether his mental condition was such that he knew he was committing an offense.

APPEAL from the County Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Alexander Campbell, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, CURREY, C. J.

The defendant was indicted for voting twice at the general election held on the 6th of September, 1865. To the indictment he pleaded not guilty. Upon the trial he was found guilty and sentenced to be imprisoned in the State Prison for one year.

It is provided by statute that any person who shall vote more than once at any one election shall be deemed guilty of a felony, and, upon conviction, shall be imprisoned in the State Prison for a term not less than one year nor more than five years. (Laws 1858, pp. 165, 166.)

Statement of facts.

The evidence shows that the defendant voted at the election polls of the Fifth District of San Francisco at about 10 o'clock in the forenoon of the day above mentioned, when his right to vote was challenged on the ground that he was not a resident of the district. The challenge being withdrawn the defendant voted. About two or three o'clock in the afternoon the defendant returned to the same polls very much intoxicated and again offered to vote. The same person who had challenged his right to vote at that place in the morning informed him that he had voted before, and that he would get himself in trouble if he voted again. The defendant, in reply, vehemently protested that he had not voted, and declared his willingness to so make oath. The oath prescribed by the statute was then administered to him by the proper officer, to which

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he responded in the affirmative, and then voted the second time.

When the cause was submitted to the jury the Court charged them as follows: "The indictment charges that the defendant at an election for members for the State Senate and Assembly, held on the 6th day of September, 1865, in the Fifth Election District of this city and county, did knowingly, unlawfully and feloniously vote more than once at the same election. The language of the statute upon which the indictment is framed is, 'any person who shall vote more than once at any election * * * shall be deemed guilty of a felony.' The word *knowingly* is not in the statute, and although used in the indictment yet it may be rejected as surplusage, for the State is not bound to support by proof the allegation in the indictment that the act of double voting was knowingly done. The statute makes the act of voting more than once at the same election, and not the act of voting knowingly more than once at any election, a crime. If, therefore, you are satisfied from the testimony in the case that the defendant, at an election for members of the State Senate and Assembly, held on the 6th day of September, 1865, in the Fifth Election District, in this city and county, voted twice, then, although the defendant may at the time have been under the influence of intoxicating liquors, it is your duty to bring in a verdict of guilty against him; for drunkenness is no excuse or justification for the commission of a criminal act, and evidence of voluntary intoxication is properly admissible as affecting crime only in those cases in which it is necessary to ascertain whether the accused was in a mental condition which enabled him to form a deliberately premeditated purpose, and this is not one of those cases. The counsel for the defendant requests me to charge you that every crime involves a union of act and intent or criminal negligence. This is true. The law does not punish a man for his intention, nor for his act disconnected from his intention, but act and intent must unite to constitute a crime."

At the conclusion of the charge the counsel for the defend-

ant requested the Court to withdraw that portion of it which stated that the act of double voting need not be knowingly done, which the Court declined to do.

The defendant's counsel excepted to each and every portion of the charge except that given at the request of the defendant's counsel, and also excepted to the refusal of the Court to withdraw the portion of the charge which stated that the act of double voting need not be knowingly done.

The defendant's counsel asks for a reversal of the judgment, on the ground that the jury were misdirected by the Court in relation to the knowledge which it was necessary the defendant should have as to what he had done and was doing when he voted the second time, and he insists that the error of the charge was not cured by the instructions given at the defendant's request, "that every crime involves a union of act and intent or criminal negligence."

Evil intent necessary to constitute a crime.

The theory upon which it was sought to exculpate the defendant of criminality was that he was in such a condition, mentally, when he voted the second time, as not to know that he had already voted, but on the contrary believed that he had not done so. It is laid down in the books on the subject that it is a universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea.* (1 Bish. on Cr. Law, Secs. 227 and 229; 3 Greenl. Ev. Sec. 13.) Therefore the intent with which the unlawful act was done must be proved as well as the other material facts stated in the indictment; which may be by evidence either direct or indirect tending to establish the fact, or by inference of law from other facts proved. When the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption. (3 Green-

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leaf's Ev. Secs. 13, 14 and 18.) Now, when the statute declares the act of voting more than once at the same election by the same person to be a felony, it must be understood as implying that the interdicted act must be done with a criminal intention, or under circumstances from which such intention may be inferred. The defendant's counsel at the trial seems to have apprehended the true rule of law on the subject, and to have regarded the burden as on the defendant to show by evidence that the act of his voting the second time was not criminal, and for this purpose evidence of his intoxicated and excited condition was submitted to the jury, in order that they might determine under the rules of law governing in such cases whether the defendant was conscious at the time of having voted before at the same election. The question was fairly before the jury whether the defendant knew what he was about when he voted the second time. From the evidence in the case it appears he was very much intoxicated, but whether to a degree sufficient to deprive him of all knowledge of having already voted was for the jury to decide.

Proof of intoxication by one charged with a crime.

The law does not excuse a person of a crime committed while in a state of voluntary intoxication. In *Rex v. Thomas*, 7 Car. & Payne, 817, Parke, B., said to the jury: "I must tell you that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished;" and to the same effect is the language of Alderson, B., in *Rex v. Meakin*, 7 Car. & Payne, 297; and in harmony with this doctrine is the whole current of English authority. (1 Whar. Cr. Law, Sec. 39.) Mr. Wharton says that in this country the same position has been taken with marked uniformity, it being invariably held that voluntary drunkenness is no defense to the *factum* of guilt; the only point about which there has been any fluctuation being the extent to which evidence of drunkenness is receivable to

determine the exactness of the intent or extent of deliberation." (Id. Sec. 40.) In *Pigman v. The State*, 14 Ohio, 555, it was held that a man who passes counterfeit money is not criminally liable if he is so drunk as to be incapable of knowing that it is counterfeit, and consequently of entertaining the intention to defraud, provided there was no ground to suppose he knew the money to be counterfeit before then; and in *Swan v. The State*, 4 Humph. 136, 141, the Supreme Court of Tennessee said: "Although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness as a matter of fact affecting such state and condition of the mind is a proper subject for consideration and inquiry by the jury. The question in such case is what is the mental status?"

In *Reg. v. Moore*, 3 Car. & Kir. 319, the defendant was indicted for an attempt to commit suicide by drowning, and in defense it was alleged she was unconscious from drunkenness at the time of the nature of the act. The Court was of the opinion that if she was so drunk as not to know what she was about, the jury could not find that she intended to destroy herself. (*Reg. v. Cruse*, 8 Car. & Payne, 546; *United States v. Rondenbush*, 1 Bald. 517; *Kelly v. The State*, 3 Sm. & Marsh. 518; *Pirtle v. The State*, 9 Humph. 663; *Haile v. The State*, 11 Humph. 154.)

While the condition of the accused, caused by drunkenness, may be taken into consideration by the jury with the other facts of the case, to enable them to decide in respect to the question of intent, it is proper to observe that drunkenness will not excuse crime. (*People v. King*, 27 Cal. 514.) The inquiry to be made is whether the crime which the defendant is accused of having committed *has in point of fact been committed*, and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and status of the accused at the time, may be given in evidence to the jury, and may be considered by them in determining whether

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the defendant was in fact guilty of the crime charged against him. Great caution is necessary in the application of this doctrine, and those whose province it is to decide in such cases should be satisfied beyond a reasonable doubt, from all the facts and circumstances before them, that the unlawful act was committed by the accused when his mental condition was such that he did not know that he was committing a crime, and also that no design existed on his part to do the wrong before he became thus incapable of knowing what he was doing.

We have said more respecting the character of the defense or excuse imposed than would have been necessary, but for the reason that it is important that those who may be guilty of violating the law may understand that a state of intoxication can be of no avail as an excuse for crime.

Voting twice at same election.

The Court told the jury, as we have seen, that the statute makes the act of voting more than once at the same election, and not the act of voting knowingly — that is, intentionally — more than once at any one election, a crime. The Court further charged the jury, in substance, that evidence of voluntary intoxication is properly admissible as affecting crime only in those cases in which it is necessary to ascertain whether the accused was in a mental condition which enabled him to form a deliberate premeditated purpose to commit the offense, but in the same connection the jury were told in effect that the case before them was not one of those cases in which the defendant could interpose the defense that he was intoxicated to a degree rendering him unconscious of what he had done and of the wrong which he was doing. The Court then instructed the jury, at the request of the defendant's counsel, that every crime involves a union of act and intent or criminal negligence. That the law does not punish a man for his intention, but that act and intent must unite to constitute a crime; but at the same time the Court refused to modify in

any degree the charge already given, though especially requested so to do.

Taking these two portions of the charge together we may understand the Court as declaring:

First — That a crime is constituted by the commission of a forbidden act, united with a felonious intent on the part of him who does the act or caused it to be done.

Second — That the act of voting more than once at the same election was a crime, even though not done with knowledge on the part of him who so votes that he was voting the second time.

Third — That the case before the jury was not one in which the defendant could show that by reason of his intoxicated condition he did not know what he was doing when he voted the second time.

We do not see how these charges, involving the question of felonious knowledge or intention can be harmonized. The second and third stand in direct antagonism to the first, and the greater prominence was given to the one of which the defendant complains and which we think to be erroneous. We are of the opinion the Court erred also in excluding from the jury any consideration of the mental status of the defendant by reason of his intoxicated condition when he voted the second time.

The judgment is reversed and a new trial ordered.

Mr. Justice SAWYER expressed no opinion.

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ATTORNEY-GENERAL.

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CERTIORARI.

1. **WHEN CERTIORARI LIES.**— The Supreme Court cannot, on certiorari, review mere errors of law of the County Court in cases where it has jurisdiction, even though there is no appeal. *People v. Burney*, 459.
2. **CERTIORARI.**— The Supreme Court, on certiorari, will only inquire whether the inferior Court exceeded its jurisdiction. *People v. Diuinello*, 632.

CHATTEL.

See **CONTRACT**, 7.

CLERK OF COURT.

See **MANDAMUS**, 2, 3.

CLIENT AND ATTORNEY.

See **ATTORNEY AND CLIENT**, 1, 2, 3.

CLOUD ON TITLE.

See **EQUITY**, 2, 12, 13.

COMMISSIONER.

1. **COMMISSIONER TO EXECUTE DEED.**— The appointment of a Commissioner by the Court, in a final decree to execute a deed, if the defendant fail to do so within a given time; *Held*, not to justify the reversal of the judgment. *Hager v. Shindler*, 47.

be presumed, nothing appearing to the contrary, that the same meaning was intended wherever like words or expressions are subsequently used. *Id.*

6. **CONTRACT WITH TWO CONSTRUCTIONS.**—Where a contract admits of two constructions, one of which nullifies the contract, and the other upholds it, the former must be discarded and the latter adopted. *Id.*
7. **CHATTEL OF NO VALUE NOT SUBJECT OF CONTRACT.**—If a chattel be of no value to any one, it cannot be the basis of a contract, but if it be of any value to either party, it may be a good consideration for a promise. *Gifford v. Carvill*, 589.

See **SAN FRANCISCO**, 2, 3; **FRAUD**, 8, 11, 12; **EVIDENCE**, 2; **EQUITY**, 6, 7, 8, 9, 10, 11; **SAN JOSE**, 1, 2, 3; **SPECIFIC CONTRACT ACT**, 1, 2, 3; **COVENANT**, 1; **CORPORATION**, 2, 6; **AGENT**, 2; **PLEADINGS**, 16.

CONVEYANCE.

See **TRUST**, 1, 5; **ATTORNEY IN FACT**, 1.

COPARTNERSHIP.

See **SPECIFIC CONTRACT ACT**, 1; **PLEADINGS**, 9.

CORPORATIONS.

1. **CERTIFICATE OF INCORPORATION.**—A certificate of incorporation which does not set forth the name of the city, or town and county in which the principal place of business of the corporation is to be located, does not establish the existence of a corporation. *Harris v. McGregor*, 124.
2. **PREREQUISITES TO CORPORATE EXISTENCE.**—There must be a substantial compliance with all the forms of the Act by the persons seeking to become a body corporate, before the corporation can be considered *in esse*. *Id.*
3. **DIRECTORS OF A TURNPIKE COMPANY.**—The Directors of a corporation formed for the construction of plank or turnpike roads are not liable personally, under the nineteenth section of the Act creating such corporations, on a contract made by them, which by its terms binds the corporation, unless the stockholders have adopted by-laws, and the same have been filed in the Recorder's office, and the contract is made in violation of the by-laws. *Hall v. Crandall*, 568.
4. **POWER OF DIRECTORS OF TURNPIKE COMPANY.**—The Directors of a corporation formed for the construction of plank or turnpike roads are not vested with any power by the statute until the stockholders have adopted by-laws defining their powers, and the same have been filed in the Recorder's office. *Id.*
5. **LIABILITY ON PROMISSORY NOTE OF A CORPORATION.**—At common law the officers of a corporation are not liable personally on a promissory note of the corporation, made by them as such officers, in which the promise to pay is made by the corporation, and not by the officers personally. *Id.*
6. **WHEN AGENT ACTS WITHOUT AUTHORITY OF PRINCIPAL.**—When the contract of the officers of a corporation binds the corporation by its terms, and not the officers personally, and the contract is made without authority, so that the corporation is not holden on it if any personal liability exists against the officers, it results from the wrong done by them in undertaking to act without authority. *Id.*
7. **ASSESSMENT ON STOCK OF MINING CORPORATION.**—The Board of Trustees of a corporation formed for the purpose of carrying on mining have the power to levy and collect, for the purpose of paying the proper and legal expenses of the company, assessments exceeding ten thousand dollars, even though the by-laws provide that the Trustees shall not have power to incur an in-

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debtedness exceeding ten thousand dollars, accrued and existing exceeds that amount. *Sul Co.*, 585.

8. ENJOINING TRUSTEES OF CORPORATION.—The Trust will not be enjoined from selling stock for where the assessment is levied for the purpose legal expenses of the company, if the amount allowed by law. *Id.*

9. VALUE OF MINING STOCK.—A finding of fact that a corporation is valueless does not necessarily show that the corporation is valueless. *Gifford v. Carroll*, 589.

See CONDEMNATION OF LAND, 2, 3, 4; MUNICIPAL
9, 10, 11.

COSTS.

1. COSTS WHEN A NEW TRIAL IS AWARDED.—When reversed by the appellate Court, and a new trial is granted, the party who recovers judgment on the second trial, he is entitled to the costs of the first trial. *Stodda*
2. COSTS IN ACTION FOR MONEY.—In an action for damages, the prevailing party is entitled to his costs. *Id.*

See DEFAULT

COUNTIES.

1. LIABILITY OF COUNTY FOR JAIL GUARD.—The liability of a county for the expense of a temporary guard for the County is to the persons employed by the Sheriff as such. *Neville v. Soleno County*, 251.

COUNTY COURTS.

See JUSTICES OF THE PEACE

COUNTY TREASURER.

See OFFICIAL BONDS, 4.

COVENANT.

1. CONSTRUCTION OF COVENANT TO INDEMNIFY.—When a party had been engaged in purchasing and exporting goods, and the defendant carried it on on his own account, and the parties entered into an agreement to carry on the business, and the defendant covenanted to indemnify plaintiff against the business in which the parties had before the covenant did not apply to the liabilities incurred on the business on his own account. *Hae*

See WARRANTY, 1, 2.

CRIMINAL LAW.

1. PROOF ON TRIAL FOR ARSON COMMITTED TO DEFENDANT.—In an indictment for arson for burning a building by a duly incorporated company, with intent to defraud, it is sufficient for the people to prove a corporate agent by whom the insurance was made was an

- poration. The compliance of a foreign corporation with the laws of this State need not be proved. *People v. Hughes*, 257.
2. PROOF AS TO *de facto* EXISTENCE OF CORPORATION.—In an indictment for arson committed with intent to defraud an insurance company, the testimony of the agent that he was acting as the agent of the corporation, and effected the insurance and delivered the policy, which was received by the defendant, is sufficient to warrant the jury in finding the *de facto* existence of the corporation, and the existence and delivery of the policy by its *de facto* agent. *Id.*
 3. PROOF OF VALIDITY OF A POLICY OF INSURANCE IN CRIMINAL CASE.—In a trial for arson committed with intent to defraud an insurance company, it is not necessary for the people to prove that the policy was valid, and that the defendant could maintain an action thereon for loss. *Id.*
 4. ARREST OF JUDGMENT IN CRIMINAL CASE.—In an indictment for arson committed with intent to defraud an insurance company, a variance between the name of the company as charged in the indictment and as proved on the trial, is no ground for the arrest of the judgment. *Id.*
 5. JUDGMENT OF IMPRISONMENT.—A judgment in a criminal case that the defendant be imprisoned four years from the time of his delivery to the Warden of the penitentiary, is not erroneous. *Id.*
 6. ACTING UNDER CONTROL OF ANOTHER DOES NOT EXCUSE A LARCENY.—On a trial for larceny, it is not competent for the defendant to prove that he was under twenty-one years of age, for the purpose of showing that in committing the offense he was acting under the control of another. *People v. Richmond*, 414.
 7. SAME.—The command of a master to his servant, or principal to his agent, or parent to a child, will not justify a criminal act done in pursuance of it. *Id.*
 8. JURISDICTION OF A LARCENY.—When property has been stolen in one county and carried into another, jurisdiction of the offense is in either county. *People v. Robles*, 421.
 9. PLEA IN CRIMINAL CASE.—If the defendant in a criminal case refuses to plead after his demurrer to the indictment has been overruled, the Court may direct a plea of not guilty to be entered for him. *People v. Jocelyn*, 562.
 10. WITNESS IN CRIMINAL CASE.—A witness, not examined before the grand jury, whose name is not indorsed on the indictment, may be examined by the People on the trial. *Id.*
 11. ERROR.—The record must affirmatively show error; the appellate Court will not presume it. *Id.*
 12. INDICTMENT FOR RAPE.—In an indictment for the crime of rape it is not necessary to aver the age of the person charged with committing the rape. *People v. AA Yeh*, 575.
 13. INDICTMENT FOR ASSAULT WITH DEADLY WEAPON.—An indictment for "an assault with a deadly weapon, with an intent to inflict upon the person of another a bodily injury," should charge the offense in the language of the statute, and should also allege that the weapon was deadly, or such facts as necessarily show that it was deadly. *People v. Jacobs*, 579.
 14. TESTIMONY OF AN ACCOMPLICE IN A CRIMINAL CASE.—Where the prosecution rely on the testimony of an accomplice, jointly indicted with the defendant, the defendant should not be discharged at the close of the testimony for the prosecution, if the accomplice's testimony has been corroborated in some particulars. *People v. Garnett*, 622.

15. BURGLARY MIXED WITH LARCENY.— Our crime is an offense as burglary mixed with larceny or another crime.
16. INDICTMENT CHARGING TWO OFFENSES.— Under an indictment which charges a burglary mixed with a larceny, if in connection with a burglary another offense is committed, it may be made the foundation of a separate indictment.
17. SAME.— If the indictment charges two offenses, and the jury find the defendant guilty of one, it is taken by demurrer. *Id.*
18. TRIAL WHERE INDICTMENT CHARGES BURGLARY.— If the indictment charges a burglary mixed with a larceny, and the jury find the defendant guilty of the larceny, the Court cannot, after the jury have retired, change the issue by instructing them to find the defendant guilty of grand larceny.
19. LARCENY IS NOT INCLUDED IN BURGLARY.— Larceny committed at the same time a burglary is committed, is not included in burglary; the larceny is no part of the burglary.
20. EXAMINATION OF TRIAL JURORS.— In an examination of the competency of a juror, the Court may inquire whether the juror can try the case and follow the law as declared by the Court, and upon the answer may form an opinion. *People v. ...*
21. BURGLARIOUS TOOLS AS EVIDENCE.— Burglarious tools of the defendant soon after the commission of the burglary, in evidence by the prosecution whenever they are shown, of circumstances which tend to connect the defendant with the burglary charged in the indictment. *People v. ...*
22. SAME.— Before burglarious tools can be received in evidence, it must be shown that the burglary charged was in fact committed with the aid of burglarious tools like those found in evidence, and that the defendant was in the possession of the tools at the time the offense was committed. *Id.*
23. A BILL OF EXCEPTIONS MUST SHOW ERROR.— If a bill of exceptions for burglary, only shows an exception to the exclusion of evidence, the presumption is that all the facts stated entitle them to be shown in evidence. *Id.*
24. SAME.— Where the admissibility of evidence depends upon the exclusion of other evidence, it will be presumed on appeal that the bill of exceptions is of a character to justify the ruling of the Court, unless it is clearly shown by the bill of exceptions. *Id.*
25. VOTING TWICE.— The act of voting more than once at a trial is not a crime unless done knowingly and with intent to defraud. *Harrie*, 678.
26. PROOF OF INTENT TO DO WRONG.— The intent with which an act is done must be proved; but when an unlawful act is done by the accused, the law in the first instance presumes intent, and the proof of justification or excuse lies upon the defendant.
27. PROOF OF DRUNKENNESS IN A CRIMINAL CASE.— Drunkenness at the time the commission of a crime may introduce evidence that the defendant was intoxicated at the time he committed the act, not to enable the jury to determine whether his act was a crime, but to enable the jury to determine whether his act was a crime, that he knew he was committing an offense. *Id.*

See NEW TRIAL, 4; WITNESS,

DAMAGES.

1. WHO LIABLE FOR INJURY CAUSED BY DEFECTIVE CONSTRUCTION OF BUILDING.—
The owner of a building, who has the same erected by a contractor, is liable in cases where an action can be maintained, for injuries sustained by another by reason of its defective construction, after he has accepted of the building from the contractor. *Fanjoy v. Seales*, 248.
2. WHEN OWNER OF BUILDING NOT LIABLE FOR ITS DEFECTIVE CONSTRUCTION.—
The owner of a building, who has the same erected by a contractor, and accepts of the same when completed, is not liable for injuries afterwards sustained by one engaged in painting the same, resulting from the fall of the cornice caused by the painter suspending a staging to the cornice. *Id.*
See NEW TRIAL, 1; EJECTMENT, 2, 3, 4, 5, 6; PRACTICE, 3.

DEED.

1. EVIDENCE TO PROVE SALE OF LAND BY INTESTATE DURING HIS LIFETIME.—
Proof that the intestate stated in his lifetime that he did not own any interest in land, that he had sold out, and of his allowing others to deal with the land as their own, is not evidence sufficient to sustain an allegation in a complaint against the administrator that the intestate executed and delivered deeds of the land. *Thompson v. Lynch*, 189.
2. DESCRIPTION OF LAND SOLD IN TAX DEED.— If the description of the land assessed is definite and accurate in the assessment, and is inserted in the tax deed, and the purchaser at the sale buys a portion of it for the taxes and costs, such description in the tax deed of the portion sold as will enable its boundaries to be determined by extrinsic evidence, applying the description in the deed to the land, is sufficient. *Brunn v. Murphy*, 326.
3. DEED MADE BY AN ATTORNEY OR AGENT.—*Held*, that a deed purporting in the body of it to be the deed of Stephen Smith, but signed "Stephen Henry Smith, attorney in fact of Stephen Smith," is not the deed of Stephen Smith, even though the person describing himself as attorney in fact of Stephen Smith had authority to execute a deed of conveyance of the premises described for and in the name of Stephen Smith. *Morrison v. Bowman*, 337.
4. ATTORNEY IN FACT AND PRINCIPAL.— A deed for land, executed by an attorney in fact for his principal, must be executed in the name of the principal, otherwise nothing will pass by the deed. *Id.*
5. DEED OF EXECUTOR, WHO IS ALSO AN HEIR, DEVISEE, AND LEGATEE.— A deed of conveyance by an executor of land belonging to the estate, in which he himself has an interest, purporting to convey in his individual capacity and also as executor, passes to the grantee his individual interest, but not the rights and interests of the heirs therein, which the executor had no authority, under the will, to convey. *Id.*
6. DESCRIPTION OF LAND IN CONVEYANCE.— Although distances and quantity must yield to natural monuments in determining the boundaries of land, yet they are entitled to some weight in getting at the intention of the parties where there is a latent ambiguity as to what monument was intended. *Doe v. Vallejo*, 386.
7. DEED OF LAND TO L. B. & Co.— A conveyance of land to L. B. & Co. vests the legal title of the same in L. B. alone, and his deed will give to his grantee a good and valid title. *Winter v. Stock*, 407.
8. A PRIOR DEED NOT CONCLUSIVE AS TO TITLE.— A deed which has been re-

corded is not conclusive evidence of title in grantee in a prior unrecorded deed who is in 486.

See MORTGAGE, 1, 2; TRUST, 1, 2, 3, 4, 5; COMMISSION, 1, 2, 3.

DEFAULT.

1. ORDER VACATING A JUDGMENT ENTERED BY DEFAULT.— Judgment entered by default and allowing a default to be disturbed by the appellate Court except in the discretion by the Court below. *Howe v. Independent*.
2. COSTS ON VACATING JUDGMENT.— An order vacating a judgment by default, and allowing the defendant to answer, on condition of previous costs as a condition of setting aside a judgment.
3. AFFIDAVIT TO SET ASIDE A JUDGMENT BY DEFAULT.— To vacate a judgment by default, under the Practice Act, must show — First, that the default was taken, inadvertence, surprise, or excusable neglect; second, that the defendant has a meritorious defense. *Bailey v. Bailey*.
4. ORDER SETTING ASIDE A JUDGMENT BY DEFAULT.— A judgment entered by the Court below, setting aside or refusing to set aside a judgment, rests much in the discretion of the Court, and the appellate Court unless plainly erroneous, yet the discretion below is not a mental discretion, to be exercised in conformity with the discretion of the Court below.
5. SETTING ASIDE A DEFAULT ON THE GROUND OF EXCUSABLE NEGLIGENCE.— A judgment by default should not be set aside on the ground of excusable neglect because the preparation of the answer requires time, and during a portion of the time the attorney was absent.
6. WHO SHOULD MAKE AFFIDAVIT TO SET ASIDE A DEFAULT.— An affidavit to set aside a default, should be made by the attorney, unless reasons exist for having it made by some one else.
7. SHOWING MERITORIOUS DEFENSE ON MOTION TO SET ASIDE A DEFAULT.— An affidavit of the attorney, on motion to set aside a judgment by default, from the examination of the defendant's case, and from the examination, he verily believes that it is better to show that the defendant has a meritorious defense.
8. DEFENDANT'S ANSWER SHOULD BE SHOWN TO COURT.— A judgment by default to prepare and exhibit to the Court the defendant's answer to a motion to set aside a default. *Id.*
9. COSTS ON OPENING A DEFAULT.— When a judgment by default is opened, costs should be imposed as a condition.

DEMURRER.

1. DEMURRER FOR AMBIGUITY.— A demurrer to a complaint for uncertainty, should point out specially in what the uncertainty consists, or it will be disregarded. *Biano v. Klemm*.
- See MISJOINDER OF PLAINTIFFS,

DEPOSITION.

1. DEPOSITION OF PARTY TO AN ACTION.— The testimony of a party may be taken by deposition, if he resides out of the State.

DISMISSAL OF ACTION.

See **MANDAMUS**, 2, 3; **BOND**, 2.

DISTRICT COURTS.

See **CONSTITUTIONAL LAW**, 5.

DISTRICT JUDGE.

See **OFFICE**, 1.

DRAFTS.

See **BILLS OF EXCHANGE**, 1; **PLEADINGS**, 17, 18; **FRAUD**, 13.

DRUNKENNESS.

See **CRIMINAL LAW**, 27.

EJECTMENT.

1. **EJECTMENT DOES NOT AFFECT TITLE.**—Actions of ejectment do not affect the title to property, but the possession. The plaintiff recovering possession goes into possession with the title he previously had. *Long v. Neville*, 131.
2. **SET-OFF OF VALUE OF IMPROVEMENTS AGAINST DAMAGES.**—The Court cannot, in an action to recover lands, set off the value of improvements against the damages, if the defendant does not desire it. *Carpentier v. Gardiner*, 160.
3. **DAMAGES FOR AN OUSTER BY A CO-TENANT.**—A tenant in common when ousted by his co-tenant may recover the damages resulting from the ouster as well as when ousted by an entire stranger to the land. *Carpentier v. Mitchell*, 380.
4. **DAMAGES RECOVERABLE FROM TIME OF OUSTER.**—In an action to recover the possession of land by a tenant in common against a co-tenant, the plaintiff can recover damages only from the time of the actual ouster proved. *Id.*
5. **DAMAGES IN EJECTMENT.**—In an action to recover the possession of land by the owner of an undivided one half, against defendants who entered as naked trespassers, but purchased an undivided interest after the commencement of the action, plaintiff can recover the value of one half the rents and profits, including those resulting from the improvements placed on the land by defendants, during the period of wrongful possession. *Id.*
6. **SETTING OFF VALUE OF IMPROVEMENTS AGAINST DAMAGES.**—Where one who enters as a naked trespasser places improvements on the land, and afterwards buys an undivided interest, in an action against him to recover possession of the land by a tenant in common who owned prior to the wrongful entry the defendant cannot set off the value of his improvements against the damages. *Id.*
7. **PURCHASE OF PROPERTY PENDING AN ACTION TO RECOVER POSSESSION OF IT.**—One who buys land during the pendency of an action to recover possession of it, in which his grantor is a defendant, may thereafter continue the defense in the name of his grantor, or may cause himself to be substituted in his place. *Maattek v. Thorp*, 444.
8. **WHO SHOULD BE REMOVED UNDER A WRIT OF POSSESSION.**—*Prima facie*, all who come into possession of land after an action is brought to recover possession of it must go out, if the plaintiff recover and a writ of *habere facias*

- possessionem is issued, for the presumption is contrary, that they came in under the defendant.
3. EFFECT OF SERVICE OF WRIT OF RESTITUTION.—A of land, and turned out under a writ of *habere* for not a party to the suit, is not prejudiced in his bringing the suit. *Id.*
- See UNDERTAKING, 1, 2, 3, 4, 5; SURETIES, 1; LIT COURT, 1, 2; EVIDENCE, 15, 16

EMBEZZLEMENT.

See ESTATES OF DECEASED PERSONS.

EMINENT DOMAIN.

See CONDEMNATION OF LAND, 1, 2

EQUITY.

1. IGNORANCE AS A GROUND FOR RELIEF IN EQUITY.—unlearned and ignorant of legal proceedings affords equity, unless it also appears that he relied for it against whom relief is sought, and such person of facts. *Boyd v. Blankman*, 20.
2. JURISDICTION OF COURT OF EQUITY WHERE THERE Court of equity has jurisdiction at the suit of the purchased land at Sheriff's sale, and received a annul and set aside, as a cloud upon title, a decree the recovery of judgment by the judgment debt and to defraud the creditor. *Hager v. Shindler*, 41.
3. EQUITY AND LAW JURISDICTION.— Before a case can the reach of a Court of equity, it must be made remedy would be adequate and complete. *Id.*
4. A CLOUD ON TITLE MAY BE REMOVED BY ONE NOT ment creditor need not be in possession of land in a suit in equity, after he has a Sheriff's deed, to given by the debtor to defraud him before he recovers.
5. CREDITOR'S BILL AND SUIT TO CANCEL FRAUDULENT distinction between a creditor's bill and a suit in Sheriff's deed of land, to cancel a fraudulent deed debtor before the Sheriff's sale or recovery of judgment.
6. RESCINDING AN EXECUTED CONTRACT FOR SALE OF Commissioners, having the title of the land of a cloud a rule to sell to occupants in possession at a certain session of seventy-two acres petitions to buy a tract seventy-two acres, giving courses, distances, and in and the tract contains the seventy-two acres, and portion of another, and the Board have the means facts, and make a deed to the petitioner, a Court of the contract at the suit of the Board. *Board of C (No. 1)*, 172.
7. FACTS NECESSARY TO OBTAIN RESCISSION OF EXECUTED party seeks the rescission of an executed contract for ground of a false suggestion, it must appear that

- complained of was as to a material fact by which the party was induced to make the contract to his injury, and in relation to which he placed confidence in the other, by reason of his not having the means of knowledge within his own reach. *Id.*
8. MISREPRESENTATION WITHOUT INJURY.—A naked misrepresentation, however wrong in point of morals, unaccompanied by actual damage, does not afford ground for relief against an executed contract for the sale of land. *Id.*
 9. RESCISSION OF CONTRACT BY REASON OF SUPPRESSION OF FACT.—A contract will not be rescinded on account of a suppression of a fact by one party, unless the concealment resulted in injury, and the concealed fact was material, and one which the party was under some legal or equitable obligation to disclose. *Id.*
 10. MISTAKE IN NUMBER OF ACRES SOLD.—If land is sold by metes and bounds, with a statement of the number of acres, a mistake as to the number of acres affords no ground of action, unless it appears beyond controversy that quantity was one of the principal conditions of the contract. *Id.*
 11. WHEN VENDOR HAS MEANS OF ASCERTAINING QUANTITY OF LAND.—If the seller has the means of ascertaining the quantity of land and does not do so, equity will afford him no relief on the ground that the buyer misrepresented the quantity. *Id.*
 12. ACTION TO RESTRAIN A SALE BY AN ADMINISTRATOR.—A sale by an administrator of land once the property of the intestate, but which he is alleged to have sold during his lifetime, will cast such a cloud on the title of the intestate's prior grantee as will enable him to maintain an action to restrain the sale. *Thompson v. Lynch*, 189.
 13. ONE NOT IN POSSESSION MAY ENJOIN SALE OF LAND.—The owner of land not in possession, may maintain an action to restrain a sale of the same by his own grantor, which would cast a cloud upon his title. *Id.*
 14. SETTING ASIDE A DECREE OF FORECLOSURE AND DEED MADE THEREUNDER.—If a testator has mortgaged land devised by his will, and after his death, one who erroneously supposed he had acquired the legal title before the death of the testator buys in the property under the mortgage sale and acquires the legal title, which by his own election and the election of the devisees he holds in trust for them, a Court of equity will not set aside the decree of foreclosure and deed made thereunder. *Morrison v. Bozman*, 337.
 15. SALES BY TRUSTEE OF PORTIONS OF TRUST ESTATE.—If one who holds the legal title in trust for devisees under a will, makes advances to pay encumbrances on the trust estate, and then sells portions of the property, a Court of equity in taking an account will confirm the sales and charge the trustee with the proceeds. *Id.*
 16. ENFORCEMENT OF PAROL CONTRACT IN EQUITY.—If the lessee and lessor enter into a parol agreement with regard to a new lease of the premises the lessee is occupying, and the amount of rent to be paid by the lessee, and improvements made by him and to be made on the premises, and afterwards the lessee executes a lease in writing relating to the same subject matter, containing terms varying from the parol agreement, a Court of equity will not rescind the written lease and enforce the parol contract, nor, unless upon some equitable ground, as mistake, or fraud, will it reform the written lease to make it correspond with the parol contract. *Ewald v. Lyoas*, 550.
 17. SAME.—A Court of equity will not enforce a parol contract, if, after the same is made, the parties voluntarily enter into a written contract differing

1. **ERROR MUST BE CLEARLY SHOWN.**— The record must not leave it to be inferred from argument as to what the record means. *People v. Robles*, 421.
2. **ERROR MUST BE SHOWN.**— The appellate Court will not reverse for error unless the record shows it. If an error must rely on the record to disclose it. *Ward v. Ward*, 421. See WITNESS, 2.

[illegible]

7. STATEMENTS OF A DECEASED PERSON — EVIDENCE OF.— The statements of one who claims a lot of land, made to a stranger, after it has been taken possession of by one who claims adversely to him, are not admissible in evidence in favor of his heirs in an action brought by them to recover possession of the same. *Id.*
8. RIGHT TO GIVE EVIDENCE OF FORMER STATEMENTS MADE BY A WITNESS.— The former statements of one who is a witness on a trial, cannot be given in evidence by the opposite party, except for the purpose of impeachment, and then not unless the witness was questioned as to such former statements made by him. *Id.*
9. IDENTITY OF NAMES SHOWS IDENTITY OF PERSONS.— When a former judgment is received in evidence, the identity of the names in the judgment with those in the pending action is *prima facie* sufficient to establish the identity of persons. *Garwood v. Garwood*, 514.
10. EVIDENCE TO SHOW SALE FRAUDULENT.— The fact that the purchaser of a mining claim, after his purchase, takes a large amount of gold dust out of the same, is not admissible in evidence for the purpose of proving that the sale was fraudulent as to the creditors of the vendor by reason of inadequacy of the price paid. *Henry v. Everts*, 610.
11. EVIDENCE AS TO VALUE OF PROPERTY.— In ascertaining whether an adequate price was paid for a piece of property at the time of its sale, the evidence should be restricted to the question of what its market value was at that time. *Id.*
12. RESTRICTION OF OPERATION OF EVIDENCE.— If a party introducing evidence during the progress of a trial announces the purpose for which it is introduced, the evidence will be restricted to the purpose announced. *Id.*
13. PROOF OF A CONVERSATION.— If the plaintiff, during a trial, draws out of one of his witnesses part of a conversation between the plaintiff and another person, the defendant is entitled to prove by his witnesses the whole conversation. *Gillam v. Sigman*, 687.
14. CONVERSATION IN EVIDENCE.— A declaration made by a third person to and in the presence of the parties engaged in a controversy, at the time of the doing of an act by one of them that becomes the subject of an action, is admissible in evidence, and becomes a part of the *res gestæ*. *Id.*
15. ORDER TO COMPEL SHERIFF TO EXECUTE WRIT OF RESTITUTION.— At the hearing, under an order for the Sheriff to show cause why an order should not be made requiring him to proceed and execute a writ of *habere facias possessionem*, the burden is cast upon the Sheriff of establishing affirmatively the matters which he alleges as an excuse for refusing to serve the writ. (*Fogarty v. Sparks*, 22 Cal. 142, referred to in this connection.) *Leese v. Clark*, 685.
16. AFFIDAVITS USED ON A MOTION.— At the hearing of a motion tried on affidavits, if a copy of a deed under the control of the party relying upon it, to which there is a subscribing witness, is attached to an affidavit, and the party presenting the affidavit refuses to produce the original deed upon the demand of his adversary, and shows no excuse therefor, the copy of the deed is entitled to no weight as evidence. *Id.*
17. EVIDENCE TO SHOW RIGHT TO INTERVENE.— Where a subsequent attaching creditor intervenes in the suit between a prior attaching creditor and the common debtor, and no question is raised as to the honesty of his debt, his judgment against the common debtor is admissible in evidence to show that the common debtor owed him, and is decisive of the question. *Coghlan & Co. v. Marks*, 678.

See ATTORNEY AND CLIENT, 2; WILL, 1; DEED, 1; SWAMP LANDS, 2, 5; NOTICE, 8; PAROL TESTIMONY, 1; FRAUD, 10; CRIMINAL LAW, 21, 22, 23, 24, 27.

ESTATES OF DECEASED PERSONS

1. DEATH OF THE DEFENDANT DURING THE PENDING ACTION TO RECOVER JUDGMENT ON A PROMISSORY DEED.—Death of the defendant, and the substitution of a new defendant, does not operate as a discontinuance of the suit against him, subjects him to the Probate Act as are applicable to proceedings against an estate of a deceased person.
2. JUDGMENT AGAINST AN ADMINISTRATOR.—When the indebtedness of the estate of the deceased is *in personam* cannot be rendered against the administrator.
3. JUDGMENT AGAINST ADMINISTRATOR ENFORCING A LIEN.—If the defendant dies after the service of summons and before judgment, and the action continued against him, the Court enforcing the lien of the attachment by a sale of the property, and an application of the proceeds to the satisfaction of the judgment.
4. DEATH OF DEFENDANT DESTROYS ATTACHMENT.—If the defendant dies after the levy of an attachment upon his property, the death destroys the lien of the attachment, and the property passes into the hands of the administrator, to be administered as such.
5. RIGHT TO POSSESSION OF PERSONAL ESTATE OF DECEASED.—The right of Descents and Distributions in this State, the right of the deceased vests in the heir, but the administrator has the possession of the same, and this right of possession continues to the time of the death of the deceased. *See* *Jah*.
6. ACTION FOR WRONGFUL TAKING OF PERSONAL ESTATE.—An administrator may maintain an action for the wrongful taking of the personal estate of the deceased, intermediate the death and the grant of letters.
7. SAME.—Such action may be maintained against one who has alienated the personal estate of the deceased, within one hundred and sixteen of the Probate Act; and it creates a new right of action, but merely increases the damages.
8. SAME.—WHERE COMPLAINT ALLEGES EMBEZZLEMENT.—If such action alleges that the defendant embezzled the personal estate of the deceased, and not his own use of the personal estate of deceased, and the plaintiff is entitled to recover double damages on such allegation; but if the proofs of such conversion place intermediate the death and the grant of letters, recovery should be as in an ordinary action of trover.
9. SECTION ONE HUNDRED AND SIXTEEN OF PROBATE ACT.—Section one hundred and sixteen of the Probate Act does not afford a remedy for embezzling and alienating the personal estate of the deceased, intermediate the death and grant of letters. *Id.*
10. SAME.—Section one hundred and sixteen of the Probate Act is but a remedial statute. *Id.*
11. RIGHT OF WIDOW TO GIVE AWAY PERSONAL PROPERTY.—The widow of the deceased of personal property cannot, after the death and issuance of letters of administration, give away either title to or right to the possession of the personal property of the deceased. *Id.*

12. WHO MAY CONTEST ACCOUNT OF ADMINISTRATOR.—The right to appear in a Probate Court and contest the account of an administrator is restricted to persons who are interested in the estate. *Garwood v. Garwood*, 514.
13. INTEREST OF PERSON ASKING TO CONTEST ADMINISTRATOR'S ACCOUNT.—If there is a reasonable doubt as to whether a person who applies to be allowed to contest the account of an administrator has any interest in the estate, that doubt should be resolved in favor of the applicant. *Id.*
14. SAME.—However remote or contingent the interest of a person may be who asks to be allowed to contest an administrator's account, his right to contest should not be denied. *Id.*
15. EVIDENCE AS TO INTEREST OF ONE CONTESTING ADMINISTRATOR'S ACCOUNT.—The Probate Court is not bound by the statement in the petition of an applicant to contest an administrator's account, that he has an interest in the estate, but may take testimony as to whether he has any interest. *Id.*

See PROBATE COURT, 4.

ESTOPPEL.

1. MISTAKE IN WRITTEN ADMISSION — PAROL PROOF OF.—A written admission that a certain sum is due on a contract, signed by the party making the admission, does not estop him from showing by parol testimony that there was a mistake in the admission. *Gradwohl v. Harris*, 150.

EXECUTORS.

See SURETIES, 2; PROBATE COURT, 4.

EXECUTION.

1. EXECUTION ON JUDGMENT AFTER LAPSE OF FIVE YEARS.—An execution could not issue on a judgment under the two hundred and fourteenth section of the Practice Act before its repeal in 1861, after the lapse of five years from its entry, unless ordered to issue by the Court, after it had been judicially ascertained and found as a fact that the judgment, or some part thereof, remained unsatisfied and due. *Solomon v. Maguire*, 227.
2. EFFECT OF ORDER CONFIRMING REPORT OF REFEREE.—Where a referee reported as facts the existence and validity of a judgment more than five years old, and also reported a judgment that execution issue on the same, but stated that he had not passed on the question whether the judgment had been paid by an alleged accord and satisfaction; *Held*, that an order of Court confirming the report of the referee does not authorize the issuance of an execution on the judgment. *Id.*
3. PERIOD DURING WHICH EXECUTION IS STAYED.—The period during which an execution has been stayed by an order of Court is not to be excluded from the five years, after the lapse of which an order of Court was necessary to obtain an execution. *Id.*

See JUDGMENT, 3; LIEN, 7.

FERRY LICENSE.

1. FERRY LICENSES.—A Board of Supervisors has jurisdiction over the subject matter of granting and renewing ferry licenses. *Pisoh v. Tehama County*, 453.
2. RENEWAL OF FERRY LICENSE.—One who applies for a renewal of a ferry license, claiming precedence as an absolute right under the statute as against a party making an original application, must show that he has kept the ferry the preceding year in accordance with law. *Id.*

3. **OBJECTIONS TO RENEWAL OF FERRY LICENSE.**—license gives notice of an application for a renewal, any person may appear on the day appointing, without any notice or citation to the applicant, the renewal, and the Board may hear testimony.
4. **REFUSAL TO RENEW FERRY LICENSE.**— If a contesting party, the Board of Supervisors has jurisdiction. If found to be insufficient to entitle the party to a license. *Id.*
5. **GRANTING FERRY LICENSE.**— If an application for a license is rejected, the Board has jurisdiction to grant a license who has filed his petition and given proper notice.
6. **Query?**— Has one whose application for a renewal is rejected, and who did not appear and contest another party making an original application, a right of review as to the action of the Board of Supervisors as to said original applicant? *Id.*

FINDINGS OF FACT.

1. **CHANGE OF FINDINGS OF FACTS.**—A Judge cannot change a finding of fact in a material particular after the entry of judgment. *Carpentier v. Gardin*.
2. **FINDING OF FACTS.**—The appellate Court will not disturb a finding of fact in the record. *Id.*
3. **PRESUMPTION AS TO FINDINGS OF COURT.**—Where a finding of fact is made in the pleadings upon a material matter, the Court is presumed to have found on such matter. *Gifford*. See PRACTICE, 1, 2, 3; JUDGMENT, 8;

FORCIBLE ENTRIES AND UNLAWFUL

1. **RIGHT OF ASSIGNEE OF LANDLORD TO REMOVE TENANT.**—If a landlord leases property and assigns to the purchaser, or recognizes the purchaser cannot recover possession of the premises. Act concerning forcible and unlawful detainers.
2. **CONVENTIONAL LANDLORD ALONE CAN REMOVE TENANT.**—A tenant under the Act concerning forcible entry is given to the conventional landlord alone, and estate. *Id.*
3. **FORCIBLE ENTRY WILL NOT LIE AGAINST A SHERIFF.**—An action under the Act concerning unlawful detainers will not lie against a person in possession by a Sheriff in good faith, by virtue of a writ of restitution, and who brings the officer could not lawfully dispossess by virtue of a writ of restitution. *Brooks*, 214.
4. **SHERIFF NOT GUILTY OF FORCIBLE ENTRY IN SERVING WRIT OF RESTITUTION.**—A Sheriff is not guilty of a forcible entry, if, acting under a writ of restitution, he removes from the premises whom the writ does not run, and who is not in possession of the premises. *Id.*
5. **FORCIBLE DETAINER.**—The declaration of the defendant that he will not go off the premises unless put off by a writ of restitution constitutes a forcible detainer. *Hodgkins v. Jones*.

6. SAME.—The mere surmise of a person, that if he attempts to regain possession, force will be used to prevent it, is not enough to show a forcible detainer, but an attempt must be made to regain possession, and either force, or threats of force, used to resist it. *Id.*
7. SAME.—The action of forcible detainer is not intended as a substitute for the action of ejectment. *Id.*
8. FORCIBLE ENTRY AND DETAINER.—The general terms, "actions of forcible entry and detainer," as employed in the Constitution of this State, include actions for the unlawful holding over by tenants. *Brusmagin v. Spencer*, 681.
9. DEMAND BY LANDLORD ON TENANT WHO FAILS TO PAY RENT.—If a tenant holds over after rent has become due and remains unpaid for the space of three days, a demand by the landlord of the payment of rent and delivery of possession, both made at the same time, will enable him to maintain an action for unlawful holding over. It is not necessary to demand rent, and wait three days, and then demand possession. *Id.*

See PLEADINGS, 19.

FORECLOSURE OF MORTGAGE.

See MORTGAGE, 7.

FORMER SUIT IN BAR.

1. PRIOR ACTION PENDING AS A DEFENSE.—The defense of a prior *Us pendens* is available only where the plaintiff at least, in both actions, is the same. *O'Connor v. Blake*, 812.

FRAUDS AND STATUTE OF FRAUDS.

1. DEED TO DEFAUD CREDITORS.—A deed of land may be made to hinder, delay, and defraud creditors by a rich man as well as one who is insolvent. *Hager v. Shindler*, 47.
2. BREACH OF CONFIDENCE.—Where one reposes special confidence in another in negotiating a sale of property, and the other seeks this confidence, and then betrays it to the damage of the one by whom he was trusted, he becomes liable for the loss sustained thereby. *Hunsacker v. Sturges*, 142.
3. CONTRACT TO PAY MONEY—STATUTE OF FRAUDS.—A contract in writing, agreeing to pay to the party of the second part such sums as he may afterwards advance to a foreman of a toll road company, is not a promise to pay the debt of another, and not within the Statute of Frauds. *Gradesohl v. Harris*, 150.
4. SALE AND MORTGAGE OF PERSONAL PROPERTY.—The validity of a sale of personal property, as between the vendee and an attaching creditor, when tested upon the question of the delivery and continued change of possession, is to be determined by the same rule whether the sale was absolute or made by way of mortgage to secure an indebtedness. *Woods v. Bugbey*, 466.
5. POSSESSION OF PERSONAL PROPERTY MORTGAGED.—The mortgagee of personal property, in order to place it beyond the reach of the creditors of the mortgagor, must have actual possession of the mortgaged property. *Id.*
6. PURCHASER OF A KILN OF BRICKS.—The purchaser or mortgagee of a kiln of bricks, while being burned, must take that possession of the property which places him in the relation to the same that owners usually have to a like kind of property, in order to secure it against attaching creditors of the vendor. *Id.*
7. CHANGE OF POSSESSION OF A KILN OF BRICKS WHEN SOLD.—If the owner of a kiln of bricks, before the burning of the same has been completed, makes a

- sale thereof in good faith, and for a valid consideration, to a creditor, and the vendor completes the burning of the kiln, exercising the same apparent control as before, the sale is to be deemed fraudulent as to an attaching creditor for want of a change of possession. *Id.*
8. **WHEN SALE OF PERSONAL PROPERTY FRAUDULENT.**—The statute of this State makes a sale of personal property fraudulent and void as to creditors when there is not an actual and continued change of possession, and Courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser, or the good faith of the transaction. *Id.*
 9. **REPRESENTATIONS AS TO VALUE OF MINING STOCK.**—The value and richness of a mine belonging to a corporation, and its convenience to wood and water, are not mere matters of opinion or information, as to which the purchaser of stock from a stockholder has no right to rely upon the representations of the seller. *Gifford v. Carrill*, 589.
 10. **EVIDENCE OF FRAUD IN SALE OF MINING STOCK.**—Fraudulent representations as to the value of the mine of a corporation, made by the seller of the stock of the company to the purchaser, as an inducement for the purchaser to buy, may be given in evidence, under a proper state of the pleadings, to defeat the collection of a promissory note given for the stock. *Id.*
 11. **FRAUDULENT REPRESENTATIONS OF SELLER OF A CHATTEL.**—A party cannot resist the payment of a promissory note, given in payment for property, on the ground of fraudulent representations, unless within a reasonable time after the discovery of the fraud he offers to return the property and rescind the contract, provided the property sold is of any value to either party. *Id.*
 12. **FRAUDULENT REPRESENTATIONS IN SALE OF MINING STOCK.**—Where the purchaser is induced by the fraudulent representations of the seller to make a purchase of mining stock, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract, and resist the payment of the note given for the property. *Id.*
 13. **A PROMISE TO PAY A DRAFT MUST BE IN WRITING.**—A promise to pay a draft that may be drawn on the promisor by another person for a debt due by the drawer to the person to whom the promise was made, is void, unless in writing, and signed by the person making the promise. *Wakefield v. Greenwood*, 597.
- See **LIMITATIONS**, 1, 2; **EQUITY**, 2, 5; **PLEADINGS**, 4, 5, 16; **PLEDGER AND PLEDGEE**, 2, 3; **AGENT**, 1; **POSSESSION**, 1; **EVIDENCE**, 10, 11, 12; **LIEN**, 9, 10.

FRAUDULENT REPRESENTATIONS.

See **FRAUD**, 9, 10, 11, 12.

GOLD COIN.

See **TREASURY NOTES**, 1.

HEIR.

See **TRUST**, 1, 2, 3, 4, 5; **ESTATES OF DECEASED PERSONS**, 5.

HOMESTEAD.

1. **SALE OF HOMESTEAD BY PROBATE COURT.**—The Probate Court cannot make an order for the sale of the homestead to pay debts of the deceased, even if the debts are secured by a valid mortgage on the same. *Matter of Estate of Orr*, 101.

2. **HOMESTEAD NOT A PART OF ASSETS OF ESTATE.**—It is the duty of the Probate Court to set apart the homestead for the use of the family of the deceased, and when set apart it ceases to be a part of the assets of the estate. *Id.*
3. **ENFORCEMENT OF LIEN ON HOMESTEAD.**—Valid liens existing on the homestead, created before the death of the head of the family, must be enforced in the District Court. *Id.*

HUSBAND AND WIFE.

See COMMON PROPERTY, 1, 2; WILL, 2, 3, 4.

IDENTITY OF NAMES AND PERSONS.

See EVIDENCE, 9.

INJUNCTION.

1. **NONSUIT WORKS DISSOLUTION OF INJUNCTION.**—When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial. *Harris v. McGregor*, 124.
2. **RENEWAL OF INJUNCTION AFTER ITS DISSOLUTION.**—If a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the remittitur in the Court below. *Id.*

See EQUITY, 12, 13; CORPORATIONS, 8.

INSOLVENT CASES.

1. **PROCEEDINGS IN INSOLVENCY.**—Since the adoption of the amendment to the Constitution in 1863, proceedings in insolvency have ceased to be "special cases" in the sense in which that phrase was applied to them before that time. *People v. Rosborough*, 415.

See APPEAL, 4.

INSURANCE.

See CRIMINAL LAW, 1, 2, 3, 4.

INSTRUCTIONS TO A JURY.

1. **READING INSTRUCTIONS TO THE JURY.**—Instructions asked by counsel, and refused by the Court, should not be read in the hearing of the jury. *Waldie v. Doll*, 555.

INTEREST.

1. **INTEREST UPON INTEREST PAST DUE.**—If by the terms of a promissory note the interest is due and payable at the end of every six months, the payee is not entitled under the statute of this State to interest upon interest if the instalments of interest are not paid as they fall due, unless there is an express provision in writing to pay such interest. *Doe v. Vallejo*, 386.

See JUDGMENT, 2; PAWNBROKERS, 1, 2, 3.

INTERVENTION.

1. **RIGHT TO INTERVENE IN A SUIT WHERE PROPERTY IS ATTACHED.**—Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if

the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims. *Coghill & Co. v. Marks*, 873.

See PARTIALS TO ACTIONS, 2; EJECTMENT, 7; EVIDENCE, 17; LIEN, 9, 10.

JOINT AND SEVERAL OBLIGATION.

See BOND, 2.

JUDICIAL DISTRICTS.

See CONSTITUTIONAL LAW, 5.

JUDGE.

See JURISDICTION, 1.

JUDGMENT.

1. IMMATERIAL ERROR.—A judgment will not be reversed for an error which is immaterial. *Carpenter v. Gardiner*, 160.
 2. JUDGMENT RENDERED BY DEFAULT, BEARING INTEREST.—A judgment by default, in a suit on a note drawing interest at more than ten per cent per annum, should not direct that the judgment bear interest at the agreed rate, unless the complaint pray that the judgment bear interest at the rate named in the note. *Gautier v. English*, 165.
 3. FINDING NECESSARY TO SUPPORT AN ORDER FOR EXECUTION TO ISSUE.—A finding of facts by a referee that an alleged judgment more than five years old was properly entered, and is a good and valid judgment, does not support a judgment reported by him, that the plaintiffs have execution on the judgment. *Solomon v. Maguire*, 226.
 4. JUDGMENT SHOULD CORRESPOND WITH THE RELIEF SOUGHT.—It is not the duty of the Court by its judgment to extend to a party a real or supposed benefit which he does not ask nor manifest a desire to obtain. *Morrison v. Bowman*, 337.
 5. JUDGMENT AGAINST SURETIES ON OFFICIAL BONDS.—A judgment in an action against the sureties on an official bond, for a defalcation of the principal, should first fix the amount of the defalcation, and then proceed with a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, and then close with a proviso, that each judgment shall be satisfied by the collection or payment of the amount of the defalcation, and costs. *People v. Rooney*, 642.
- See COMMISSIONER, 1; DEFAULT, 1; PRACTICE, 1, 2, 3; LAW OF A CASE, 1; RECEIVIN, 1; ESTATES OF DECEASED PERSONS, 2; MORTGAGE, 7; RES ADJUDICATA, 1, 2, 3.

JUDGMENT ON APPEAL.

See PRACTICE, 3.

JURISDICTION.

1. TRANSFER OF CASE BY AMENDED CONSTITUTION.—When a trial was commenced and the testimony taken by a Judge before his term expired under the old Constitution, and he was re-elected; *Held*, that as a Judge under the new Constitution, he could decide the case on the evidence then taken, without a re-submission. *Seale v. Ford*, 104.

See JUSTICE OF THE PEACE, 1; MISDEMEANOR, 1; CONTEMPT OF COURT, 1.

1. **COMPETENCY OF JUROR.**—The competency of a juror must be determined by the Court, and not by the juror. *People v. Woods*, 685.

JUSTICES OF THE PEACE.

1. **JURISDICTION OF JUSTICE'S COURT.**—Three suits were commenced in a Justice's Court for the recovery of the same property, the value of which was less than three hundred dollars, which were consolidated; *Held*, that the Court had jurisdiction of the action as consolidated. *Carlaga v. Dryden*, 807.
2. **POWER OF JUSTICE TO VACATE A JUDGMENT.**—A Justice of the Peace has no power to vacate a judgment of dismissal on the ground of non-appearance of the plaintiff, and reinstate the case. *O'Connor v. Blake*, 812.

LANDLORD AND TENANT.

See **FORCIBLE ENTRIES AND DETAINERS**, 1, 2, 9; **EQUITY**, 14, 15.

LANDS.

See **MEXICAN GRANT**, 1, 2, 8; **CONDEMNATION OF LAND**, 1, 2, 3, 4; **EQUITY**, 6, 7, 8, 9, 10, 11, 12, 13; **DEED**, 1; **SWAMP LANDS**, 1, 2, 3, 4, 5.

LAW OF A CASE.

1. **JUDGMENT OF SUPREME COURT THE LAW OF A CASE.**—The judgment of the Supreme Court in a case becomes the law of the case in all its stages, unless the conditions on which it was founded are so changed as to render its accomplishment impracticable. *Estate of Pacheco*, 224.

LEGISLATURE.

1. **AID OF COUNSEL TO WITNESS BEFORE LEGISLATURE.**—A legislative assembly may refuse to a party summoned before it as a witness the aid of counsel when charged with contempt in not answering questions. *Ex parte D. O. McCarthy*, 896.
2. **COMMITTEE OF LEGISLATIVE BODY.**—The appointment of a committee by the Senate, with power to investigate charges of bribery made against members of that body, does not preclude the Senate from afterwards summoning the witnesses, and making the investigation before the bar of the Senate. *Id.*
3. **WHAT CONSTITUTES AN ISSUE WITHIN THE STATUTE AGAINST PERJURY.**—When charges of bribery are made by any person against members of either branch of the Legislature, without giving their names, and a resolution is adopted by the branch to which the members accused are said to belong, reciting the charge, and resolving to investigate it, and witnesses are summoned before it, an issue is made up within the meaning of the statute against perjury. *Id.*
4. **POWERS AND PRIVILEGES OF A LEGISLATIVE ASSEMBLY.**—A legislative assembly has all the powers and privileges which are necessary to the proper exercise, in all respects, of its appropriate functions. *Id.*
5. **SOURCE OF SAME.**—Such powers and privileges are inherent in a legislative body, and are to be ascertained primarily by a reference to the common parliamentary law. *Id.*
6. **SAME.**—A legislative assembly has all the powers and privileges conferred by the common parliamentary law unless restrained by some express provision of the Constitution, or some express law made unto itself. *Id.*

7. **POWER OF LEGISLATURE TO SUMMON WITNESSES.**—mentary law a legislative assembly may compel persons within the limits of their constituency, as subjects on which they have power to act, and in investigation. *Id.*
8. **EXAMINATION OF WITNESSES BEFORE LEGISLATIVE.**—fore a legislative assembly or its committee are some provision of law or of the Constitution as to testimony under the penalty of being adjudged punished, if they testify falsely. *Id.*
9. **MANNER OF COMPELLING WITNESSES TO TESTIFY.**—witnesses are brought before either branch of the compelled to testify by process of contempt, when refuse to do so. *Id.*
10. **WITNESSES REFUSING TO TESTIFY BEFORE THE LEG.**—of bribery is brought against members of the Bar to investigate the charge, and to summon the before its bar as a witness touching the same, an attempt for refusing to testify without sufficient

LIABILITY FOR DAMAGES

See DAMAGES, 1, 2.

LIEN.

1. **NOTICE CLAIMING A MECHANICS' LIEN.**—The notice material man, given to the employer, claiming a lien on the contractor for labor done for or materials furnished, should contain a statement that the amount for labor is due over and above all payments and offsets. *Id.*
2. **LIEN OF SUB-CONTRACTOR OR MATERIAL MAN.**—The material man, in order to hold a lien for work done for or materials furnished by a contractor, must comply strictly with the provisions of the statute. *Id.*
3. **SEVERAL NOTICES CLAIMING SAME LIEN.**—If the material man serves more than one notice claiming a lien, several notices cannot be considered together for determining the sufficiency of notice to hold a lien, but each must be sufficient in itself, and the lien will not exist unless one of them is sufficient to give it. *Id.*
4. **SUFFICIENCY OF NOTICE CLAIMING LIEN.**—The notice claiming a lien for materials furnished the contractor must specify the particular character of the materials furnished, nor the particular character of the work done in constructing the building, and if there are several materials, it is sufficient if it name one of them. *Id.*
5. **EFFECT OF LIEN ON AFFORTIONMENT OF JOB AMONG CONTRACTORS.**—If contractors apportion the job and compensation of labor among themselves by a written contract to which a material man is a party, it is no defense in an action by a material man for materials furnished one joint contractor, that when the contractor furnished, under the contract, the materials, ~~was nothing due the contractor furnished, under the~~
6. **FOR WHAT AMOUNT A NOTICE GIVES LIEN.**—The lien for labor can be enforced for all sums to be paid to the laborer when the notice is given. *Id.*

7. **ENFORCEMENT OF ATTACHMENT LIEN.**—An attachment lien upon property can be enforced only by a sale of the attached property under execution. *Myers v. Mott*, 860.
 8. **LIEN ON VESSEL FOR SUPPLIES.**—If a credit is given for supplies and materials furnished a vessel, the lien of the person furnishing the same, for the price thereof, continues on the vessel for the period of one year from the time the demand falls due. *Edgerly v. Schooner San Lorenzo*, 418.
 9. **POSTPONEMENT OF LIEN OF PRIOR ATTACHMENT ON GROUND OF FRAUD.**—Where a subsequent attaching creditor intervenes to set aside a prior attachment on the ground of fraud, if the Court finds that a portion only of the debt on which the prior attachment issued was fraudulent, the lien of the prior attachment should be postponed only as to that portion of the debt which was fraudulent. *Oophill & Co. v. Marks*, 673.
 10. **COMMENCING AN ATTACHMENT SUIT BEFORE DEBT IS DUE.**—If the debt on which an attachment was issued was not due when the suit was commenced, a subsequent attaching creditor cannot by intervention postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action. *Id.*
- See **ASSESSMENT ON LOTS**, 4; **HOMESTEAD**, 8; **CONSTITUTIONAL LAW**, 1; **ESTATES OF DECEASED PERSONS**, 8, 4; **MORTGAGE**, 7.

LIMITATIONS, STATUTE OF.

1. **CONSTRUCTIVE FRAUD — STATUTE OF LIMITATIONS.**—The clause in the seventeenth section of the Statute of Limitations, providing that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud, is applicable to constructive fraud as well as fraud in fact. *Boyd v. Blankman*, 20.
2. **LIMITATION OF TIME FOR RELIEF ON GROUND OF FRAUD.**—An action for relief on the ground of fraud may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry. *Id.*
3. **STATUTE OF LIMITATIONS.**—The Statute of Limitations is applicable alike to causes of action in equity and at law. *Id.*
4. **LIMITATION OF ACTION TO CANCEL FRAUDULENT DEED.**—The judgment creditor who has received a Sheriff's deed of the debtor's land, may bring an action to cancel a fraudulent deed of the same made by the debtor before judgment, at any time within three years after the execution and delivery of the Sheriff's deed. *Hager v. Shindler*, 47.
5. **LIMITATION OF TIME TO RECOVER RENTS AND PROFITS.**—In an action to recover lands, the plaintiff can recover the rents and profits for three years only prior to the commencement of the action, if the defendant pleads the Statute of Limitations. *Carpentier v. Mitchell*, 330.
6. **STATUTE OF LIMITATIONS ON CERTIFICATE OF DEPOSIT.**—The Statute of Limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and no special demand is necessary to put it in motion. *Brummagin v. Tallant*, 503.
7. **STATUTE OF LIMITATIONS.**—The Statute of Limitations does not begin to run in relation to pueblo lands until a patent has been issued by the United States. *Beach v. Gabriel*, 580.

See **PLEADINGS**, 1, 2, 3; **EXECUTION** 1, 3.

LIS PENDENS.

1. *Lis pendens*.—The notice of *lis pendens* does not operate. It applies only to actions which operate. *Long v. Neville*, 181.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION.—To maintain an action for malicious prosecution, the primary question to be considered is the want of probable cause, and this must be established. *Grant v. Moore*, 644.
2. SAME.—From the want of probable cause, malice is inferred. *Id.*
3. WANT OF PROBABLE CAUSE IN MALICIOUS PROSECUTION.—To maintain an action for malicious prosecution, the want of probable cause must be established. *Id.*
4. THE WANT OF PROBABLE CAUSE NOT TO BE SUBSTANTIAL.—To maintain an action for malicious prosecution, it is erroneous to require the jury the decision of the question whether there was probable cause. *Id.*
5. HOW JURY TO BE INSTRUCTED ON WANT OF PROBABLE CAUSE.—To maintain an action for malicious prosecution, if the facts are doubtful, the jury should be instructed that if they find the facts in a certain way, there was probable cause, and their verdict should be for plaintiff; *Id.*
6. WHEN THERE IS PROBABLE CAUSE.—If, in an action for malicious prosecution, it appears that the defendant had a cause of action, and that the action has been maliciously brought, although for a moment there was probable cause, and the Court should grant judgment for plaintiff. *Id.*
7. PLAINTIFF MUST PROVE WANT OF PROBABLE CAUSE.—To maintain an action for malicious prosecution the burden is on the plaintiff to prove the want of probable cause. *Id.*

MANDAMUS.

1. IN WHOSE NAME WRIT OF MANDATE MUST BE APPLIED.—To maintain an action for the writ of mandate must be prosecuted in the name of the people, and if the name of the people is used, the relator alone is interested, the writ will not issue. *Pacheco*, 210.
2. DISMISSAL OF ACTION AT PLAINTIFF'S REQUEST.—Where a plaintiff has answered to the complaint set up a cross demand, and prayed affirmative relief, and the defendant has answered, and the Court has rendered judgment in his favor for such relief, and the stipulation should be regarded as a stipulation, and that the counter claim should be dismissed. *Held*, that on this state of the record the Court is not authorized by section one hundred and forty to enter an order, upon request of plaintiff, dismissing the action. *Loewy*, 264.
3. POWERS OF THE CLERK.—The construction of the writ of mandate, and the determination of the rights of the parties under the writ, is a matter for the Court, and not for the Clerk. *Id.*

4. WRIT OF MANDATE.—A judgment rendered by a Court in a case where it had jurisdiction will not be disturbed by a writ of mandate, however erroneous. *Carlaaga v. Dryden*, 307.
5. WRIT OF MANDATE TO COUNTY JUDGE.—If a County Judge renders an erroneous judgment in a matter where he possesses jurisdiction, a writ of mandate will not be awarded to compel him to render a different judgment. *Id.*
6. STATEMENT IN INSOLVENT CASES.—It is the duty of the County Judge to settle a statement made on motion for a new trial in an insolvent case, and if he refuse, a writ of mandate will issue commanding him to do so. *People v. Roseborough*, 415.
7. WRIT OF MANDATE.—A writ of mandate will not be issued by the Supreme Court to a County Judge commanding him to recall an order made after final judgment, from which order an appeal could have been taken. *People v. Moore*, 427.

MARRIED WOMAN.

1. NOTE OF MARRIED WOMAN.—A married woman is not bound by a promissory note executed by her jointly with her husband. It is the note of her husband alone. *Brown v. Orr*, 120.

See SOLE TRADER, 1.

MECHANICS' LIENS.

See LIENS, 1, 2, 3, 4, 5, 6.

MEXICAN GRANT.

1. CONFIRMED SURVEY OF MEXICAN GRANT.—The confirmed survey of a confirmed Mexican grant of land has the same effect and validity as if a patent for the land surveyed had been issued by the United States. *Seale v. Ford*, 104.
2. TITLE ACQUIRED BY CONFIRMED SURVEY OF MEXICAN GRANT.—The confirmed survey of a confirmed Mexican grant of land gives to the confirmer a title which cannot be defeated by an older Mexican grant of a specific quantity within larger boundaries, embracing both, the survey of which has not been finally confirmed. *Id.*
3. CONFLICT BETWEEN TWO MEXICAN GRANTS.—If the plaintiff has title under a confirmed survey of a confirmed Mexican grant, and the defendant under an unconfirmed survey of a confirmed grant, which he claims to be a perfect grant, the burden of showing a perfect grant rests on the defendant. *Id.*
4. IMPORT OF WORDS "GRANT" AND "SEIZED IN FEE."—The words "grant" and "seized in fee," as used in the stipulation of counsel, admitting certain facts for the purposes of the trial, filed in this case, do not, *ex vi termini*, import a perfect grant with specific boundaries in favor of defendant's grantor, or that the grantee in said grant received juridical possession from the Mexican Government. *Id.*

See PATENT, 1, 2.

MINING.

See CORPORATIONS, 7, 8.

MINING CLAIMS.

See CORPORATIONS, 9, 10, 11.

MISDEMEANOR.

1. JURISDICTION OF SUPREME COURT.—The appellate power of the Supreme Court does not extend to cases of misdemeanor. *People v. Burney*, 459.

MISJOINDER OR PLAINTIFF

1. OBJECTION TO MISJOINDER OF PARTIES PLAINTIFF. — many persons are joined as plaintiffs must be murrer, if it appear on the face of the complaint, by answer, or the same is waived. 644
2. AMENDMENT TO ANSWER DURING TRIAL. — If the too many persons are joined as plaintiffs until he should then apply for leave to amend his answer.
3. DENIAL DOES NOT RAISE ISSUE OF MISJOINDER. — are joined as plaintiffs in an action for the recovery of a denial in the answer that the plaintiffs were injured does not present the issue of a misjoinder of either

MONEY.

See TREASURY NOTES, 1.

MORTGAGE.

1. ABSOLUTE DEED GIVEN AS A MORTGAGE. — A clear title justify a jury or a Court in finding upon proof that the deed is absolute on its face is a mortgage. *Hopper v. Hopper*.
2. PAROL TESTIMONY. — Parol testimony is admissible to show that a deed is a mortgage. *Id.*
3. ENFORCEMENT OF MORTGAGE. — A mortgage given during the life of the husband may be enforced by his heirs after the husband's death. *Brown v. Orr*.
4. MORTGAGE MADE BEFORE 1851. — A mortgage executed before the two hundred and sixtieth section of the Practice Act, a conveyance of a conditional estate to become absolute on its face is a mortgage. *Id.*
5. FORECLOSURE OF MORTGAGE BEFORE 1851. — If the mortgagor, and afterwards sold the same to a person and the mortgage was foreclosed and property of the mortgagor acquired no title if the mortgagor was a necessary party. The grantee of the mortgagor was a necessary party.
6. PRACTICE ACT OF 1850 CONCERNING FORECLOSURE. — ninth section of the Practice Act of 1850, allows his action to enforce a mortgage against the mortgagor construed as requiring the owner of the mortgage to be made a defendant. *Id.*
7. JUDGMENT IN FORECLOSURE FIXING BOUNDARIES OF THE DESCRIPTION OF THE LAND MORTGAGED, as written in a latent ambiguity which renders it uncertain as to the premises mortgaged, the Court may, in an action, as between the mortgagee and mortgagor, and by its judgment fix the boundaries of the land attached. *Doe v. Vallejo*, 386.

See CONSTITUTIONAL LAW, 2; FRAUDS, AND STATUTE

MUNICIPAL CORPORATIONS.

1. **CONTRACT OF MUNICIPAL CORPORATION.**—A municipal corporation is not bound by a contract made by its officers, unless the Act of Incorporation delegated the power to make it. *Wallace v. Mayor of San José*, 180.
 2. **CONTRACTING WITH MUNICIPAL CORPORATION.**—Those who contract with a municipal corporation are bound to know the extent of the power of its officers. *Id.*
- See **SAN FRANCISCO**, 1, 2, 3; **ASSESSMENT ON LOTS**, 1, 2, 3, 4; **ASSIGNABLE DEMAND**, 1; **SAN JOSÉ**, 1, 2, 3.

NEW TRIAL.

1. **REMISSION OF DAMAGES, OR NEW TRIAL.**—If the findings are not sustained by the evidence on a question of damages, the Court may require the plaintiff to remit the damages, or submit to a new trial. *Carpentier v. Gardiner*, 160.
2. **CONFLICT OF TESTIMONY.**—If, in an action to recover lands, the testimony of five witnesses who know the premises, on a question of damages, is contradicted by one who testifies with respect to a much larger tract, including the premises in dispute, but without knowing their location, it is not such a conflict of testimony as will preclude the appellate Court from setting aside a finding in accordance with the testimony of the one. *Id.*
3. **INCOMPETENT TESTIMONY ADMITTED.**—If incompetent testimony is admitted without objection, the Court will treat the testimony as competent on motion for non-suit and on motion for a new trial. *Janson v. Brooks*, 214.
4. **NEW TRIAL IN CRIMINAL CASE.**—A new trial will not be granted in a criminal case because a Sheriff takes charge of the jury where a Deputy Sheriff was sworn, nor because the Judge informs the jury, through the Sheriff, that if they do not agree in five minutes they must remain in the jury room over night. *People v. Hughes*, 257.
5. **ORDER DENYING NEW TRIAL IN AN EQUITY CASE.**—On an appeal from an order denying a new trial in an equity case, the appellate Court, under the system of practice in force in this State, will apply the same rule with reference to balancing conflicting testimony which it would if it had been an action at law. *Doe v. Vallejo*, 386.
6. **NEW TRIALS IN INSOLVENT CASES.**—County Courts may grant new trials in insolvent cases. *People v. Rosborough*, 415.
7. **GRANTING A NEW TRIAL IN AN ACTION AT LAW BY A COURT OF EQUITY.**—A Court of equity will not grant a new trial in an action at law where the applicant knew of the rendition of the judgment against him in the law action in time to have moved for a new trial in the law Court. *Mastick v. Thorp*, 444.
8. **WHEN COURT OF EQUITY WILL ORDER A NEW TRIAL IN A LAW ACTION.**—A party cannot maintain an action in a Court of equity to set aside a judgment against him rendered in a Court of law and obtain a new trial without showing that he had no opportunity to move for a new trial in the law Court, by reason of some mistake, accident, or surprise, unaccompanied by any fault or negligence on his part. *Id.*
9. **SAME.**—Courts of equity will not interfere and set aside a judgment at law, except when it has been obtained by fraud, or through some accident or mistake, without *laches* on the part of the party complaining, and after all remedy at law has been lost. *Id.*
10. **SAME.**—One who buys land during the pendency of an action against his grantor to recover possession of it, with a notice of the suit, and neglects

- to defend it until judgment is obtained again; to move for a new trial, cannot obtain a *Id.*
11. NEW TRIAL WHEN EVIDENCE IS CONFLICTING.—disturb the verdict if the evidence was confused who passed on the motion for a new trial did for that reason declined to review the evidence.
12. WHAT CONSTITUTES A CONFLICT IN EVIDENCE.—reviews the evidence, if the point is made that evidence, and if they find there is a substantial the jury might find either way, without becoming passion, prejudice, misconception, or caprice, turbed. *Id.*”
13. INTRODUCTION OF EVIDENCE OUT OF ITS ORDER.—is brought to the notice of the jury out of its order a new trial, if the evidence would have been the trial. *Id.*
14. NEW TRIAL ON GROUND OF DENIAL OF CONTINUANCE.—new trial on the ground that the Court denied as well as in a civil case, the defendant should absent witnesses, showing that they can testify proved, or give good reason for not obtaining *Jocelyn*, 562.
15. SURPRISE A GROUND FOR NEW TRIAL.—A new trial in a criminal case on the ground of being taken by surprise by a witness, unless the affidavits show that the testimony is true. *Id.*
16. NEW TRIAL ON GROUND OF SURPRISE.—A new trial should not be granted unless it clearly appears attributable to the facts out of which the surprise has not resulted from the fault or neglect of the party. *Schellhous v. Ball*, 605.
17. SAME.—If the party claiming to have been surprised either by a nonsuit, a continuance, or the introduction of evidence in any other way, and fails to do so, a new trial should be granted.
18. SAME.—If, during the argument of a case to the Court, counsel as to whether a certain paper was the Court decides it was, the party claiming to be surprised should apply to the Court at once for leave to introduce the testimony, if he has such testimony, and if he fails to do so, the motion for a new trial should not be granted. *Id.*
19. GRANTING A NEW TRIAL.—An order granting a new trial because the reason assigned for granting it is a good reason for granting the same. *Bolton v. ...*
20. REVIEW OF ORDER GRANTING NEW TRIAL.—The Court in granting a new trial, is not confined to the reasons assigned for granting it. *Id.*
21. NEW TRIAL.—Where the findings of the Court are in favor of the plaintiff, a new trial should be granted. *Id.*
22. ORDER GRANTING A NEW TRIAL.—If the Court be of opinion that a new trial is warranted, and for any cause the order was not set aside because the reason assigned for granting it was not a good reason, the order should be granted. *Grant v. Moore*, 644.

23. **NEW TRIAL ON GROUND OF SURPRISE.**—Where a defendant, whose property has been attached, files an evasive answer under oath, which admits the indebtedness sued on, and then, on a trial between an intervenor, a subsequent attaching creditor, and the plaintiff, without intimating that he would do so, testifies that the debt was not due, it is sufficient cause for a new trial on the ground of surprise. *Ogghill & Co. v. Marks*, 678.
24. **ORDER GRANTING A NEW TRIAL.**—An order granting a new trial does not stand or fall upon the reasons which the Court making the order assigned for it, but upon all the facts in the record. *Id.*

See VERDICT OF JURY, 1; SURPRISE, 1, 2, 3.

NONSUIT.

See NEW TRIAL, 3; INJUNCTION, 1, 2.

NOTE.

See MARRIED WOMAN, 1.

NOTICE OF APPEAL.

See APPEAL, 3.

NOTICE.

1. **NOTICE ARISING FROM POSSESSION UNDER AN UNRECORDED DEED.**—Possession of real estate by the grantee in a prior unrecorded deed is not of itself conclusive notice of the grantee's title to a subsequent purchaser whose deed is first recorded, but such possession is only evidence tending to prove notice. *Fair v. Stevenot*, 486.
2. **SAME.**—If the grantee in a prior unrecorded deed relies alone on the fact of possession of the property sold, to show notice to a subsequent purchaser whose deed is first recorded, the subsequent purchaser may show in rebuttal that he used due diligence in making inquiry and failed to attain a knowledge of the prior unrecorded deed. *Id.*
3. **SAME.**—Open, notorious, and exclusive possession of a prior grantee in an unrecorded deed is sufficient to put a subsequent purchaser whose deed is first recorded upon inquiry, and such possession is sufficient evidence of notice, unless the subsequent purchaser after making due inquiry fails to attain a knowledge of the unrecorded deed. *Id.*

NUISANCE.

1. **NUISANCE IN A HIGHWAY BY WATER.**—An action to abate a nuisance erected in a highway by water, obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land. *Blano v. Klumpke*, 156.
2. **NUISANCE IN HIGHWAY INJURIOUS TO PRIVATE PROPERTY.**—If a nuisance in a highway only affect the plaintiff, in common with the public at large, in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same. *Id.*
3. **NUISANCE A QUESTION OF FACT.**—If the complaint aver that certain obstructions placed in a highway are an obstruction to the free use and enjoyment of the plaintiff's private property, the question whether such obstructions amount to a nuisance or not, is one of fact for the jury. *Id.*
4. **NUISANCES.**—The County Courts have original jurisdiction of actions to prevent or abate a nuisance. *People v. Moore*, 427.
5. **ACTION TO ABATE A NUISANCE.**—An action to abate a nuisance is "a case in equity," and from judgment rendered in it an appeal lies to the Supreme Court. *Id.*

1. **LIABILITY OF SURETIES ON OFFICIAL BOND.**— They are liable under the statute, notwithstanding the death of the officer or Board. *People v. Evans*, 429.
2. **APPROVAL OF OFFICIAL BONDS.**— The Board of Supervisors has the power to pass on the passage of the Act of March 20th, 1855, and to assent by law to approve of the official bonds of County Officers.
3. **DISCHARGE OF SURETIES ON OFFICIAL BOND.**— The bond of a County Treasurer can be discharged by the Board of Supervisors, and the same only upon proceedings had before the time of the discharge, has power to approve of the discharge of the officer. *Id.*
4. **OFFICIAL BOND OF COUNTY TREASURER.**— A County Treasurer has jurisdiction to discharge the sureties on the official bond of a County Treasurer, or to approve of a new bond. *Id.*

[illegible]

plaintiff, who may sue on it, and if the Sheriff takes a sufficient statutory undertaking, he has no further responsibility. *Owriac v. Packard*, 194.

See SAN JOSE, 1; MANDAMUS, 1; ATTORNEY-GENERAL, 1; COUNTIES, 1; MORTGAGE, 6; BOND, 2; EJECTMENT, 7; MISJOINDER OF PLAINTIFFS, 1, 2, 3.

PARTNERSHIP.

See PLEADINGS, 9.

PATENTS.

1. PATENT FOR MEXICAN GRANT OF LAND.—A patent issued by the United States for land granted in California by Mexico or Spain, is not void because the grantee of Mexico or Spain had received grants for more than eleven square leagues before the grant on which the patent issued. *Hagar v. Lucas*, 309.
2. ATTACK ON PATENT IN COLLATERAL ACTION.—Parties who do not set up title in themselves, derived from the United States, cannot, in a collateral action brought by the patentee, attack a patent for land issued by the United States in confirmation of a Mexican grant, on the ground that the grantee of Mexico had received grants of more than eleven leagues before the grant on which the patent was issued. *Id.*
3. UNITED STATES PATENT.—A patent of the United States is not void because it is issued to the administrator of a deceased assignee of a military land warrant for land purchased by the administrator with the warrant. *Bonds v. Hickman*, 460.
4. SAME.—A patent of the United States cannot be attacked collaterally because it was issued to an administrator of a deceased person for land to which the deceased person had the right of pre-emption. *Id.*
5. PRESIDENT MAY SIGN PATENTS BY HIS SECRETARY.—The laws of the United States allow the President to appoint a Secretary, whose duty it shall be to sign, in the President's name, all patents for land granted or sold by the United States. *Id.*

See MEXICAN GRANT, 2; SWAMP LANDS, 1, 2.

PAWNBROKERS.

1. INTEREST TO BE CHARGED BY PAWNBROKERS.—The Act of 1861, prohibiting pawnbrokers or pledgees from charging more than four per cent per month on loans made on property pledged as security, is not in violation of Section 2 of Article I of the Constitution, which provides that "all laws of a general nature shall have a uniform operation." *Jackson v. Shawl*, 207.
2. ENFORCEMENT OF CONTRACT WITH PAWNBROKER.—Where a pawnbroker loans money upon property pledged, and the borrower contracts to pay him more than four per cent interest per month, he can recover possession of the property by tendering him the principal and four per cent per month interest. *Id.*
3. SAME.—*Query?*—Could the borrower in such case recover the property by making a tender of the principal sum without interest? *Id.*

PERJURY.

See LEGISLATURE, 8.

PERSONAL PROPERTY.

See FRAUDS, and STATUTE OF FRAUDS, 4, 5, 6, 7; ESTATES OF DECEASED PERSONS,

PLEADINGS.

1. PLEADINGS IN ACTION FOR RELIEF ON GROUND OF action stated in the complaint is for relief or stated to have accrued more than three years the action, the complaint should also aver that fraud had been discovered within three years tains this averment, and this issue is tried in clarity in the manner of presenting the issue *Blankman*, 20.
2. PLEADING STATUTE OF LIMITATIONS.— A defendant Limitations should not allege matter of law, but within the statute. *Id.*
3. ANSWER SETTING UP STATUTE OF LIMITATIONS.— cause of action has not accrued within five years and for any period of limitation named in the *Id.*
4. COMPLAINT BY CREDITOR TO CANCEL FRAUDULENT itor who has purchased land of the debtor at Sheriff's deed therefor, in a complaint to cancel to defraud him before judgment was recovered, was insolvent when he made the deed. *Hager*
5. COMPLAINT IN ACTION BY CREDITOR AGAINST DEED suit in equity brought by the judgment creditor land, to set aside and cancel a deed of the debtor before the recovery of judgment to defraud that the plaintiff has exhausted his remedy at law and having it returned *nulla bona*. *Id.*
6. COMPLAINT ON PROMISSORY NOTE.— A complaint after the death of the husband on a note at husband and wife during the life of the husband action, unless it aver that the husband in his life *Brown v. Orr*, 120.
7. DENIALS IN AN ANSWER.— An allegation in an answer that the defendant "averts on information and deeds were ever executed," is a sufficient denial of complaint that defendant's intestate executed and referred to. *Thompson v. Lynch*, 189.
8. COMPLAINT.— If a complaint contains more than one counts does not state a cause of action, the allegations of such count, and objections may be made at any time in the Supreme Court. *Haskell v. Moor*
9. PARTNERSHIP ACCOUNTS.— In an action at law to compel a partner to comply with a covenant to indemnify plaintiff defendant cannot set up, as a counter claim, that there was no partnership between the parties. *Id.*
10. AN ANSWER NEED NOT DENY AN AVERMENT OF DEFENSE void by reason of the infirmity of the statute if the defenses are not cured by an averment in a complaint that the defendant had, and a failure to deny the averment in the answer that the proceedings were valid or legal. *Peop*
11. DENIALS IN AN ANSWER.— If the complaint, in an action for possession of personal property, avers that the defendant is in possession of the property, this averment is

which denies that the "plaintiff was the owner and entitled to the possession of the property." *Richardson v. Smith*, 529.

12. **SAME.**— If the plaintiff, in his complaint in an action to recover the possession of personal property, avers that the "defendant wrongfully took the property from the plaintiff's possession, and from thence to the time the action was commenced, wrongfully detained the same property from him." and the defendant, in his answer, denies "that the defendant at any time wrongfully took and detained the property from the plaintiff," the allegation in the complaint is to be deemed admitted. *Id.*
13. **ANSWER SETTING UP SEIZURE OF GOODS BY ATTACHMENT.**— An answer justifying the seizure of personal property by virtue of a writ of attachment issued against a person other than the plaintiff, does not state facts constituting a defense, if it fails to allege that the defendant in the attachment suit was the owner of the property. *Id.*
14. **INSUFFICIENT DENIAL IN ANSWER.**— If the answer does not traverse the material allegations of the complaint, and the new matter contained in it does not state facts sufficient to constitute a defense, and the pleadings are not verified, a closing denial stating that "the defendant deny each and every allegation set forth in plaintiff's complaint not consistent with the foregoing answer," fails to raise any issue. *Id.*
15. **DENIAL IN ANSWER.**— An averment in a complaint that the defendant, since November, 1858, "has continued to possess and occupy said land and premises, and use the same in her said sole trader business," is not denied by a denial in the answer that defendant "has continued, since the 9th day of November, 1858, to occupy or use the said premises in her business as such sole trader." *Oamden v. Mullen*, 564.
16. **DEFENSE THAT A NOTE WAS OBTAINED BY FRAUDULENT REPRESENTATIONS.**— If a defendant would resist the payment of a promissory note, given for mining stock, on the ground that the seller made fraudulent representations as to the value of the mine, the answer should set up the defense, and aver either that the stock was valueless to either party, or that the defendant had offered to return it and rescind the contract. *Gifford v. Oarvill*, 589.
17. **COMPLAINT ON PROMISE TO PAY DEBT OF ANOTHER.**— In an action brought upon a promise of the defendant to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing. *Wakefield v. Greenhood*, 597.
18. **COMPLAINT ON PROMISE TO ACCEPT A DRAFT.**— In an action brought upon a promise made by the defendant to accept a draft which another might draw on him, it is not necessary to aver in the complaint that the promise was in writing. *Id.*
19. **COMPLAINT IN FORCIBLE ENTRY AND DETAINER.**— A complaint in forcible entry and detainer should not contain allegations respecting the defendant's appropriation of personal property. *Gillam v. Sigman*, 637.
See MISJOINDER OF PLAINTIFFS, 1, 3.

PLEDGOR AND PLEDGEE.

1. **INCOME RECEIVED BY PLEDGEE FROM PROPERTY PLEDGED.**— Where the relation of pledgor and pledgee exists, if the debt is paid, it is the duty of the pledgee to account for and pay over all the income, profits, and advantages derived from the bailment. *Hunsacker v. Sturges*, 142.

2. **FRAUD BY AGENT OF VENDOR BECOMING AGENT OF** makes the pledgee his agent to sell the property then becomes the agent of the purchaser, he comes and is bound to pay him all that he received from on his behalf. *Id.*
3. **PLEDGE OF AN UNDIVIDED HALF OF PROPERTY.**—S blacksmith, entered into an arrangement for the b S. was to do the woodwork, and W. the ironwork, the materials for the woodwork, for which he was on the interest of S. in the wagons. *Held*, that hypothecation of the interest of S. in the wagons and that when the wagons came into the possession of the pledgee in possession thereof, and was entitled until paid. *Waldie v. Doll*, 555.

See AGENT, 1; FRAUD, 2.

POSSESSION.

1. **POSSESSION OF PERSONAL PROPERTY.**—Where two persons, and one pledges his half to the other for the wagons on his premises, and marks them with control over them, the mere fact that the pledgor shows a surrender of possession by the bailee. *Waldie v. Doll*. See EQUITY, 12, 13; NOTICE, 1, 2, 8; PLEDGE.

PRACTICE.

1. **OMISSION IN FINDINGS OF FACT.**—Where the findings of the Court do not contain all the facts necessary to sustain the prevailing party to a judgment, it will be reversed unless the Court below has, after the defect has been pointed out, refused to make the required finding, and an appeal therefrom. *Lyons v. Leimback*, 139.
2. **PRESUMPTION THAT FACTS NOT FOUND WERE PROVEN.**—If the Court below is requested to supply the defect, and it refuses to do so, the presumption is that the facts not found were proven. *Id.*
3. **VACATING A FINDING BY APPELLATE COURT.**—If, in an appeal, the Court finds damages, but gives judgment for no damages, and the plaintiff appeals from that part of the judgment, and the defendant appeals from the order denying the appeal, the Court may vacate the findings as to the damages, and give judgment for no damages. *Carpentier v. Gardiner*, 160.
4. **RELEASE OF CLAIM FOR DAMAGES IN SUPREME COURT.**—If the Court finds damages in an action to recover lands, but gives judgment for no damages, and the appellate Court determines that the damages sustained by the evidence, the judgment, on an appeal, may be affirmed, if the plaintiff releases his claim for damages. *Id.*
5. **STATEMENT ON APPEAL FROM AN ORDER.**—If, on an appeal, after judgment, the statement contains facts outside the judgment, it should specify the grounds upon which appeal is taken. *Well v. Griffing*, 192.
6. **ADMISSION OF INCOMPETENT TESTIMONY WITHOUT OBJECTION.**—If testimony is admitted without objection, it is treated by the parties as competent testimony. A question as to its competency cannot be raised in the appeal. *Puckard*, 194.

7. **MODE OF COMMENCING SUITS.**—The mode of commencing suits and acquiring jurisdiction of the parties is controlled by the Practice Act, and not by the practice which prevailed at common law. *Dupuy v. Shear*, 238.
8. **POINTS NOT NOTICED.**—Points not made in the Court below, nor embraced in the grounds upon which the appeal was taken, will not be considered by this Court. *Stoddard v. Treadwell*, 281.
9. **STATEMENT ON APPEAL.**—If there is nothing in the statement showing that it is a statement on motion for a new trial, and the statement declares that the motion for a new trial was overruled, it will be regarded as a statement on appeal. *Hagar v. Lucas*, 309.
- See COMMISSIONER, 1; DEFAULT, 1; JUDGMENT, 1, 2; NEW TRIAL, 1; FINDINGS OF FACT, 1, 2; ESTATES OF DECEASED PERSONS, 1, 2; SUMMONS, 1, 2, 3; VERDICT OF JURY, 1; MANDAMUS, 2, 3; BOND, 2; PLEADINGS, 8; EJECTMENT, 7; RULES OF DISTRICT COURT, 1; INSTRUCTIONS TO A JURY, 1.

PRE-EMPTION.

See SWAMP LANDS, 1, 5.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 1, 2, 3, 4.

PRINCIPAL AND AGENT.

See ATTORNEY IN FACT, 1, 2.

PROBATE COURT.

1. **ORDERS OF PROBATE COURT.**—If the Probate Court, in a matter where it has jurisdiction, makes an order upon insufficient evidence, or contrary to the evidence, the order cannot on that ground be attacked in a collateral proceeding. *Boyd v. Blankman*, 20.
2. **ORDER OF PROBATE COURT TO SELL REAL ESTATE.**—If an administrator procures an order of the Probate Court for the sale of real estate to pay a debt which the administrator had previously paid with funds of the estate, it is not a fraud which will enable the order to be attacked in a collateral proceeding. *Id.*
3. **SAME.**—An order of a Probate Court to sell all the real estate of an intestate to pay debts, when the sale of a small portion would have been sufficient, cannot for this reason be set aside in a collateral proceeding. *Id.*
4. **APPOINTMENT OF EXECUTORS.**—The judgment of the Supreme Court, settling the right of two persons to be appointed executors of an estate, should be carried into effect by the Probate Court, notwithstanding the death of one of the persons before the Probate Court acts on the matter. *Estate of Pacheco*, 224.

See HOMESTEAD, 1, 2; ESTATE OF DECEASED PERSONS, 1, 2; RES ADJUDICATA, 1, 2.

PROMISSORY NOTE.

See MARRIED WOMAN, 1; PLEADINGS, 6, 16; CERTIFICATES OF DEPOSIT, 1; SOLE TRADER, 1; CORPORATIONS, 8, 11, 12.

RAILROAD CORPORATIONS.

See CONDEMNATION OF LAND, 1, 2, 3, 4.

REAL ESTATE.

See TRUST, 1, 2, 3, 4.

REFERENCE AND REFEREE.

1. ORDER OF REFERENCE — WHAT IT SUBMITS TO THE REFEREE.— A reference, with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the Clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid on the judgment. *Solomon v. Maguire*, 227.

See JUDGMENT, 3; EXECUTORS, 2.

REPLEVIN.

1. JUDGMENT IN REPLEVIN.— In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. *O'Connor v. Blake*, 812.
2. REPLEVIN FOR MONEY.— Replevin is a proper remedy to recover a package of gold coin sealed up in a leather bag. *Skidmore v. Taylor*, 619.

RESTITUTION — WRIT OF.

See UNDERTAKING, 1, 2, 3, 4, 5; SHERIFFS, 1, 2.

RES ADJUDICATA.

1. JUDGMENT OF PROBATE COURT ON ISSUANCE OF LETTERS OF ADMINISTRATION.— Where the husband dies without living issue, and leaves his wife pregnant, and she is afterwards delivered of a child, and then applies for letters of administration upon the estate of the child, and the father of the deceased contests the issuance of letters on the ground that the child was not born alive, and the issue is tried, and the Probate Court finds that the child was born alive, and grants the letters, the judgment of the Probate Court is evidence upon the question as to whether the child was still-born, in a subsequent application of the father of deceased to contest the account of the administrator, and is conclusive upon that question. *Garwood v. Garwood*, 514.
2. DOCTRINE OF *res adjudicata* APPLIES TO PROBATE COURTS.— The doctrine of *res adjudicata* applies to judgments and decrees of the Probate Court as well as to those of any other judicial tribunal. *Id.*
3. RULE AS TO CONCLUSIVENESS OF JUDGMENTS.— The rule that a judgment of a Court having jurisdiction directly upon the point in controversy is as a plea, a bar, and as evidence conclusive between the same parties and their privies, is restricted to facts directly in issue, and does not embrace facts which may be in controversy but rest in evidence. *Id.*

RULES OF DISTRICT COURT.

1. RULE OF DISTRICT COURT AS TO INSTRUCTIONS.— If there is a rule of the District Court requiring instructions to be handed to the Judge by a certain time in the progress of the trial, it is not error for the Court to refuse to give instructions not handed to the Judge in time. *Waldie v. Doll*, 556.

SAN FRANCISCO.

1. **SIXTH SECTION OF CONSOLIDATION ACT OF SAN FRANCISCO.**—The clause in the sixth section of the Act of 1862, amending the Consolidation Act relating to San Francisco, allowing the owners of the major part of the frontage of lots liable to be assessed for street improvements to take a contract at the price awarded without having put in a bid, means in those cases where a small street terminates in a principal street, the owners of the major part of the frontage on the principal street. *Oochran v. Collins*, 129.
 2. **COMPLETION OF STREET CONTRACT IN SAN FRANCISCO.**—The owner of a lot sued for street improvements in San Francisco cannot show in defense that the contractor did not perform the work according to his contract, if the Superintendent of Streets has accepted the work as completed. His remedy is an appeal from the decision of the Superintendent to the Board of Supervisors. *Id.*
 3. **RESOLUTION TO DO WORK ON A STREET IN SAN FRANCISCO.**—Under the provisions of section three of the Act of 1862, the Mayor of the City and County of San Francisco is not required to sign a resolution of the Board of Supervisors declaring their intention to improve a public street. *Id.*
- See **ASSESSMENT ON LOTS**, 1, 2, 3, 4; **CONSTITUTIONAL LAW**, 1; **ASSIGNABLE DEMAND**, 1.

SAN JOSE.

1. **POWER OF MAYOR AND COMMON COUNCIL OF SAN JOSÉ TO SUE.**—The Mayor and Common Council of the City of San José can sue in the corporate name for the recovery of such real property as belongs to the city. *Wallace v. Mayor of San José*, 180.
 2. **POWER OF MAYOR AND COMMON COUNCIL OF SAN JOSÉ TO CONTRACT.**—The Mayor and Common Council of the City of San José have no power to enter into a contract by which the city becomes obligated to pay an attorney at a future time a sum of money, if he succeeds in placing the city in possession of certain real estate, unless there is money in the Treasury at the time to pay the same, after paying the expenses of the city government and all other demands legally due. *Id.*
 3. **CONTRACT BY SAN JOSÉ CREATING DEBT TO ARISE IN FUTURE.**—The Mayor and Common Council of San José have no authority to bind the city by the creation of a debt to arise in future, unless there is money in the Treasury at the time to pay the same, after paying the expenses of the government and all other demands legally due. *Id.*
- See **EVIDENCE**, 2.

SENATE.

See **LEGISLATURE**, 10.

SHERIFF.

1. **DUTY OF SHERIFF IN SERVING WRIT OF RESTITUTION.**—It is the duty of the Sheriff, having the writ of *habere facias possessionem*, to remove all persons who came upon the property after the suit was brought, except a person other than the defendant, who is in possession under a title adverse to the defendant. *Long v. Neville*, 181.
2. **SERVICE OF WRIT OF *Habere Facias Possessionem*.**—Where ejectment is brought against a tenant alone, and pending the action the landlord dispossesses him and leases to another tenant who has no notice of the pend-

ency of the action, it is the duty of the Sheriff *habere facias possessionem* to remove the see PARTIES to ACTIONS, 3; BOND, 1; FORCIBLE COUNTIES, 1; EJECTMENT, 8, 9; EVID

SOLE TRADER.

1. A PROMISSORY NOTE AND MORTGAGE OF SOLE TRADER.— One who became a sole trader under the Act of 1852, for public house and farming, could lawfully execute name a valid promissory note for the purchase of her for use in said business, and could also execute mortgage on the same to secure the purchase 564.
2. PURCHASE OF PROPERTY BY SOLE TRADER.— The quantity purchased by a sole trader was bought for use in is one of fact. *Id.*

SPECIFIC CONTRACT ACTION

1. PARTNERSHIP CONTRACT TO PAY IN GOLD.— One may bind the firm, by a contract in writing signed with debt of the firm in a specific kind of money.
2. ENFORCEMENT OF PAYMENT IN GOLD FOR GOODS PURCHASED BY A FIRM, WITH A VERBAL UNDERSTANDING.— gold coin, may be enforced in gold coin, if, after suit has been commenced on it, one of the firm in the firm name, dated before the sale, to pay plaintiff avers a contract to pay in gold made before.
3. JUDGMENT PAYABLE IN GOLD COIN.— If the complaint by defendant to pay for goods sold in gold and such contract is made after suit commenced judgment should be rendered payable in gold coin. See CONTRACT, 2, 3.

STATUTES CONSTRUED.

Section two hundred and sixty of the Practice Act, Probate Act, sections one hundred and eighty and one in *Boyd v. Blankman*, 35, 36.

Statute of Limitations, fourth subdivision of section Blankman, 44.

Practice Act, section sixty-eight, in *Howe v. Independent*.

Sections four, seven, nine, twelve, thirteen, and seven Act of San Francisco, (Laws 1862, p. 394,) in *Estates*.

Sections two and four of the Homestead Act, Laws of 1862, hundred and twenty-first and one hundred and ar Probate Act, in *Matter of W. H. Orr*, 103.

Sections thirty-five, thirty-six, and forty-three of the roads, (Laws 1861, p. 622,) and thirtieth section in 1863, in *San Francisco and San José Railroad*.

Section two of the Act "to provide for the formation purposes," (Wood's Digest, 119,) in *Harris v. Harris*.

Sections six and eight of Consolidation Act of San 391, 393,) in *Cochran v. Collins*, 130.

Practice Act, section twenty-seven, in *Long v. Nevill*.

- Section two of Act regulating appeals, (Laws of 1861, p. 589,) in *Lyons v. Leimback*, 140, and in *Carpentier v. Gardiner*, 163.
- Section nine of the Act concerning attorneys and counsellors, in *Board of Commissioners v. Younger*, (No. 2,) 149.
- Practice Act, section forty-eight, in *Board of Commissioners v. Younger*, (No. 2,) 150.
- Practice Act, section two hundred and forty-nine, in *Blanc v. Klumpke*, 159.
- Sections one and two of Act of 1850, (p. 92,) relating to interest, in *Gautier v. English*, 166.
- Practice Act, section one hundred and forty-seven, in *Gautier v. English*, 166.
- Section four of "Act concerning forcible entries," etc., (Statutes 1863, p. 653,) in *Reay v. Cotter*, 170.
- Sections ten, twelve, and fourteen of Act of 1859, incorporating San José, in *Wallace v. Mayor of San José*, 184.
- Practice Act, sections one hundred and twenty-three, one hundred and thirty-six, and one hundred and thirty-seven, in *Curliac v. Packard*, 195.
- Sections nine and eighteen of the Act "granting bounties to volunteers," etc., (Statutes 1864, p. 486,) in *People v. Pacheco*, 211.
- Practice Act, sections four and four hundred and sixty-eight, in *People v. Pacheco*, 218.
- Section three of Act to regulate appeals, (Statutes 1861, p. 589,) in *Estate of Pacheco*, 226.
- Practice Act, sections two hundred and fourteen and three hundred and seventy-five, in *Solomon v. Maguire*, 229.
- Practice Act, sections twenty-two, twenty-three, one hundred and forty-eight, and one hundred and forty-nine, in *Dupuy v. Shear*, 239, 243.
- Section twenty-nine of the Act of 1851, concerning Sheriffs, in *Neville v. Solano County*, 251.
- Practice Act 1851, section two hundred and sixty, and ninth section of Practice Act of 1850, in *Skinner v. Buck*, 255, 256.
- Practice Act, section one hundred and forty-eight, in *People v. Loewy*, 266.
- Sections two and three of Act concerning pawnbrokers, passed April 17th, 1861, in *Jackson v. Shawl*, 270.
- Mechanics' Lien Law*, (Statutes 1862, p. 385,) in *Davis v. Livingston*, 286.
- Act concerning Trade Marks, (Statutes 1863, p. 155,) in *Derringer v. Plate*, 294.
- Practice Act, sections one hundred and thirty-five, five hundred and fifty-one, five hundred and eighty-six, and five hundred and ninety-one, in *O'Connor v. Blake*, 315, 316.
- Probate Act, sections one hundred and forty, one hundred and eighty-six, and two hundred and thirty-nine, in *Myres v. Mott*, 362.
- Practice Act, sections one hundred and thirty-two, two hundred and two, and two hundred and fourteen, in *Myres v. Mott*, 362.
- Sections one and three of Act relating to interest, in *Doe v. Vallejo*, 391.
- Section three hundred and seventeen of Practice Act, in *Edgerly v. Schooner San Lorenzo*, 419.
- Practice Act, section sixty-eight, in *Balley v. Taaffe*, 423.
- Sections two, three, four, five, and six of Act concerning sureties on official bonds, (Statutes 1853, p. 224,) in *People v. Evans*, 432.
- Section two of Act concerning office of County Treasurer, (Laws 1850, p. 115,) section twenty-five of Act of 1855, to create Boards of Supervisors, and sections one and eleven of Act concerning official bonds, (Laws 1850, p. 74,) in *People v. Evans*, 435.
- Sections sixty-three and sixty-four of Act to incorporate the City of Sacramento, (Statutes 1863, p. 415,) in *People v. Hastings*, 450.
- Act concerning ferry licenses, in *Finch v. Tehama County*, 455.

Sections fifteen and seventeen of the Statute of Frauds, Probate Act, section one hundred and sixteen, in Jah Probate Act, section two hundred and thirty-four, in Revenue Act, section four, in *People v. Home Insurance Act of 1852 concerning sole traders*, in *Camden v. Statute of Frauds*, section twelve, in *Wakefield v. Practice Act*, section three hundred and forty-six, in Act for the punishment of contempts and trespasses, *People v. Dwinelle*, 633.

Sections forty, forty-four, and forty-five of Practice 639.

Sections three and four of the Forcible Entry a (p. 653,) in *Brummagin v. Spencer*, 665.

STIPULATION.

See *MEXICAN GRANT*, 4; *ATTORNEY AND CLIENT*.

STREETS — PUBLIC.

See *SAN FRANCISCO*, 1, 2, 3.

SUMMONS.

1. **TIME WITHIN WHICH SUMMONS MUST BE ISSUED.**—1860 to the one hundred and twenty-third section Clerk is not authorized to issue a summons in a from the Court, after the expiration of one year ! plaint. This principle applies as well to causes ! filed before, as to those in which the complaint ! ment took effect. *Dupuy v. Shear*, 238.
2. **SUMMONS ORDERED TO BE ISSUED BY THE COURT.**—If ! direct a summons to issue after the expiration of the power rests in the legal discretion of the not be set aside on appeal unless it clearly appea ! not soundly exercised. *Id.*
3. **ORDER OF COURT STRIKING OUT COMPLAINT.**—Whe ! action by filing a complaint and issuing summon ! the defendant until nine years have elapsed, an o ! defendant's motion, striking out the complaint f ! not such an abuse of discretion as to justify the ! ing the order. *Id.*

SUPERVISORS.

1. **BOARD OF SUPERVISORS — JURISDICTION.**—A Board with limited jurisdiction, and its jurisdiction mu ! its proceedings. *Finch v. Tehama County*, 454.

See *FERRY LICENSE*.

SUPREME COURT.

1. **CONSOLIDATION OF CAUSES IN SUPREME COURT.**—I ! ant each appeal from different portions of the parties do not stipulate that either transcript m ! each appeal must be heard on its own transcript.

See *PRACTICE*, 8; *MISDEMEANOR*, 1; *TR*.

SURETIES.

1. **SURETIES ON UNDERTAKING TO STAY WRIT OF RESTITUTION.**— If, pending an appeal from a judgment for plaintiff in ejectment, the plaintiff sells or leases a part of the premises recovered, the sureties on an undertaking to stay a writ of restitution pending the appeal are not released from their liability on the same. *De Castro v. Clarke*, 11.
2. **RELEASE OF LIABILITY OF SURETIES ON EXECUTOR'S BOND.**— If, in an action against the executors of an estate, brought by the legatees to recover a judgment for money found to be in the hands of the executors, and adjudged to be paid to the legatees by the Probate Court, a judgment is entered by consent of the parties under a stipulation in writing, and made a part of the judgment, payable in installments thereafter, the sureties, not consenting to the arrangement, are released from their liability on the executor's bond. *Fordyce v. Ellis*, 96.
3. **SURETIES ON APPEAL BOND.**— Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmance of the judgment, and charges the sureties on the undertaking on appeal. *Chase v. Beraud*, 138.
4. **DISCHARGE OF SURETIES ON BOND TO SHERIFF.**— If the principals in a bond given to a Sheriff to release goods from attachment, tender to the plaintiff in the attachment suit the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged from their obligation on the bond; and for the purpose of discharging the sureties, it is not necessary that such tender be paid into Court, or kept good. *Owiso v. Packard*, 194.
5. **DEPOSIT TO SECURE SURETIES IN CRIMINAL RECOGNIZANCE.**— Where money or property is deposited by a surety, on a recognizance in a criminal case, with a trustee, to secure his co-sureties on the recognizance, the People have no claim on the money or property in case the recognizance is forfeited, nor does the money stand in place of a recognizance. *Skidmore v. Taylor*, 612.
6. **SAME.**— In such case, if the co-sureties consent that the trustee holding the money and property deliver it to the surety who deposited it, he cannot justify a refusal on the ground that a judgment has been recovered against the sureties on the recognizance. *Id.*

See UNDERTAKING, 1, 2, 3, 4, 5; OFFICIAL BONDS, 1, 3; TRUSTEE, 2; JUDGMENTS, 5.

SURPRISE.

1. **SURPRISE DURING A TRIAL.**— When, during the progress of a trial, conditions are found to exist which may amount to legal surprise, the Court should, if an application is made therefor, grant relief at once, if the facts are such as would justify the Court in setting aside the verdict after the trial. *Schellhaus v. Ball*, 605.
2. **EVIDENCE OF SURPRISE DURING A TRIAL.**— The party alleging surprise during the progress of a trial should show it by the best evidence within his reach. *Id.*
3. **SAME.**— If, during a trial, facts exist which amount to legal surprise, these facts should be shown by the affidavit of the attorney, and not of his client. *Id.*

SWAMP LANDS.

1. **PRE-EMPTIONER MAY ATTACK STATE PATENT.**— A person who had settled upon and claimed as a pre-emptioner unsurveyed public land of the United States, before a sale of the same as swamp and overflowed land, and the issuance of a patent therefor by the State, is in such privity with the title of the United States as enables him to attack the patent by showing that the land is not swamp and overflowed. *Robinson v. Forrest*, 317.

2. EVIDENCE THAT LAND IS SWAMP AND OVERFLO
for land sold as swamp and overflowed, before
the State by the United States as swamp and
clusive evidence of the character of the same
introduced to show whether it is dry, or swamp
3. LEGAL SUBDIVISIONS OF PUBLIC LAND.—The plat
used in the Act of Congress, passed September
and overflowed lands, refers to the smallest
gressional system of surveys. *Id.*
4. STATE OWNERSHIP OF SWAMP LANDS.—The de
owner of all swamp and overflowed lands in
Summers v. Dickinson, 9 Cal. 554, and *Kearney*
modified. *Id.*
5. PLAT OF UNITED STATES SURVEY AS EVIDENCE.—
between one claiming under the State, and a
whether a particular tract of land is swamp
plat of the survey by the United States is admissi
lines of the legal subdivisions, but not to prove
and overflowed. *Id.*

TAXES.

1. ASSESSMENT FOR TAXES.—An assessment of land
Dooley, and to all owners and claimants know
owners and claimants of any interest, present or
upon the same," is good under the Revenue Act
Acts of 1857 and 1859. *Brunn v. Murphy*, 326.
2. AN ASSESSMENT NECESSARY TO THE VALIDITY OF
to be valid, must rest upon an assessment made
law, by an Assessor elected by the qualified electo
or town in which the property is taxed for State
People v. Hastings, 449.
3. WITHOUT AN ASSESSMENT A TAX DEED VOID.—If
and assessed for the purpose of taxation, the deed
Id.
4. ASSESSOR TO BE ELECTED BY THE DISTRICT WHERE
An assessment made by an Assessor elected by the
City and County of Sacramento, is not a sufficient
tax in the City of Sacramento for city purposes.
5. COPYING A FORMER ASSESSMENT ROLL NOT AN
of a certified copy by an Assessor of an assessment
Assessor a previous year, is not an assessment for
Id.
6. LAW FIXING THE ASSESSED VALUE OF PROPERTY.—
law, fix the assessed value of property. *Id.*
7. TAXATION OF UNITED STATES BONDS.—The bonds
in pursuance of the Acts of Congress, are not subject
v. Home Insurance Co., 533.
8. TAXATION OF STATE BONDS.—Bonds of the State
property within the meaning of the term "personal
Revenue Act, and are subject to taxation. *Id.*
9. TAXATION OF BONDS IN THIS STATE OWNED BY A FOREIGN
bonds of this State owned by a foreign insurance
this State, and deposited with a banker, in pursuance
Id.

regulate foreign insurance companies doing business in this State, and under the control of an agent of the company, are subject to taxation in this State. *Id.*

10. **ASSESSMENT OF PERSONAL PROPERTY.**—Personal property in this State belonging to a non-resident, may be assessed to such owner, notwithstanding he is a non-resident. *Id.*
11. **SAME.**—If personal property in this State belonging to a non-resident is in the possession of a trustee or agent, it may properly be assessed to the agent or trustee having it in possession. *Id.*
12. **SAME.**—An error made by assessing personal property to the wrong owner or claimant, under the Revenue Act of 1857, and Acts amendatory thereof, does not affect the validity of the assessment. *Id.*
13. **DESCRIPTION OF BONDS ASSESSED.**—Bonds of this State belonging to a foreign insurance company, but deposited in this State in accordance with law, when assessed for taxes, are sufficiently described by being designated "money and bonds deposited as per statute." *Id.*
14. **TAXATION OF FOREIGN INSURANCE COMPANIES.**—The percentage on premiums which foreign insurance companies doing business in this State pay to the State under the Act to regulate foreign insurance companies doing business in this State, is not a substitute for taxation. *Id.*
15. **STATE BONDS ARE PROPERTY.**—The bonds of this State which are owned by a foreign insurance company, but kept in this State, in accordance with the Act of the Legislature requiring such companies to deposit bonds here as security for their liabilities, are a portion of the capital of the company, and are property in this State within the meaning of the Revenue Act. *Id.*
See **ASSESSMENT ON LOTS**, 1, 2, 3, 4; **EVIDENCE**, 1; **DEED**, 2.

TENANTS IN COMMON.

See **EJECTMENT**, 3, 4, 6.

TESTIMONY.

See **PRACTICE**, 6; **NEW TRIAL**, 3.

TITLE.

See **MEXICAN GRANT**, 2, 3; **CONDEMNATION OF LAND**, 2, 3, 4; **EJECTMENT**, 1; **DEED**, 7, 8; **NOTICE**, 1, 2, 3; **AYUNTAMIENTO**, 1.

TRADE MARKS.

1. **RIGHT OF PROPERTY IN A TRADE MARK.**—The right of property in a trade mark is recognized by the common law, and does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute. *Derringer v. Plate*, 292.
2. **PROPERTY IN TRADE MARK NOT LIMITED BY TERRITORIAL BOUNDS.**—The right of property in a trade mark is not limited in its enjoyment by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may properly be made concerning the use and enjoyment of other property. *Id.*
3. **STATUTE OF 1863 CONCERNING TRADE MARKS.**—The statute of 1863 concerning trade marks does not take away the common law remedy for the protection of the same from those who do not register their trade mark according to the provisions of the Act. *Id.*

TRANSCRIPT.

1. AMENDING TRANSCRIPT IN SUPREME COURT.—The a document to be inserted in or stricken from perfect it, but it cannot vary or amend the document, 460.
2. COPY OF PLEADINGS IN TRANSCRIPT.—If the Court on the ground that the evidence is insufficient to alleged, and an appeal is taken from the order, an authenticated copy of the pleadings, or an contents. *McQuade v. Whaley*, 612.
3. STATEMENT OF ISSUES MADE BY THE PLEADINGS.— of the pleadings made by appellant's counsel, and but not agreed to by the opposite attorney, or its ment, constitutes no part of the record. *Id.*

See SUPREME COURT, 1.

TREASURER OF STATE.

1. TRANSFER OF MONEY BY TREASURER OF STATE.—The not, prior to January 1st, 1865, transfer to the in the fund created by the Act of April 4th, 186 lands for the relief of the volunteers of this State of the United States. *People v. Pacheco*, 210.

TREASURY NOTES.

1. TREASURY NOTES EQUAL TO GOLD COIN IN LAW.—A dollar in United States treasury notes made a debt, is equal to and therefore the equivalent of *Reese v. Stearnes*, 273.

See CONTRACT, 2, 3.

TRIAL.

See JURISDICTION, 1; PRACTICE, 6; BOND, 2;

TRUST.

1. HEIR RETAINS AN ASSIGNABLE INTEREST IN LAND BY AT HIS OWN SALE.—If the administrator of an estate belonging to the estate, under an order of the Court him, and at the sale becomes the purchaser through takes and holds the legal title in trust for the estate wards conveys it to him, the heir retains such an land as is assignable, and the assignee may maintain administrator to enforce a trust. *Boyd v. Blank*.
2. ADMINISTRATOR BUYING AT HIS OWN SALE IS TR administrator becomes a purchaser, through and the estate sold by him under an order of the Probate the equitable title, and his deed conveys such legal title is vested in the administrator who holds.
3. SAME.—In such case the deed of the heir conveys the deed is evidence of his intention to disaffirm the sale.
4. NOT NECESSARY FOR *Cestui Que Trust* TO DISAFFIRM OF TRUST ESTATE.—Where an administrator at the purchaser through another person of land of the

reasons for holding that the relation of trustee and *cestui que trust* is not by the fact of the sale shifted from the land to the proceeds of the sale, but that the administrator remains a trustee as to the land until the heir affirms the sale. *Id.*

5. PURCHASE BY ADMINISTRATOR AT HIS OWN SALE NOT VOID.—If an administrator at his own sale, made under an order of the Probate Court, buys the land of the estate through another person, the sale is not void, but only voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee. *Id.*

TRUSTEE.

1. REIMBURSEMENT OF ADVANCES MADE BY ONE ACTING AS TRUSTEE.—Where one supposed he had acquired the legal title to land in trust for certain devisees under a will, and under that belief, in discharge of his supposed trust, paid off encumbrances existing on the land, and expended money necessary for its preservation, *held*, that he was entitled to be reimbursed what he had so paid, with interest, notwithstanding he had not in fact acquired the legal title to the land. *Morrison v. Bowman*, 337.
2. TERMINATION OF RELATION OF TRUSTEE.—Where one has received property or money in trust to hold for the security of sureties on a recognizance, a release by the sureties of all claim on the property and a demand on the bailee terminates the trust, and it then becomes his duty to return the property to the bailor. *Skidmore v. Taylor*, 619.

See EQUITY, 13, 14; SURETIES, 5, 6.

TURNPIKE COMPANY.

See CORPORATIONS, 2, 4.

UNDERTAKING.

1. ACTION ON UNDERTAKING TO STAY WRIT OF RESTITUTION PENDING AN APPEAL.—In an action on an undertaking executed by and on behalf of the defendants in a judgment in ejectment, conditioned to pay the value of the use and occupation of the premises pending the appeal, an answer setting up that pending the appeal the plaintiff conveyed a part of the premises to one or more of the defendants in the judgment, and had leased portions to other parties, does not state facts sufficient to constitute a defense. *De Castro v. Clarke*, 11.
2. *IDEM*.—Such answer failing to show when the conveyance was made, it will be deemed not to have been made until the last day the appeal was pending. *Id.*
3. *IDEM*.—Such answer is also defective in not stating that the use and occupation of the portions of the premises conveyed and leased was of any value. *Id.*
4. RIGHT OF ACTION ON UNDERTAKING TO STAY WRIT OF RESTITUTION.—A right of action on an undertaking executed to stay a writ of restitution pending an appeal from a judgment in ejectment accrues upon the affirmance of the judgment, though the liability of the obligors may continue until the appellants deliver possession of the premises recovered. *Id.*
5. RECOVERY ON UNDERTAKING TO STAY WRIT OF RESTITUTION.—The plaintiff in a judgment in ejectment in an action on an undertaking to stay a writ of restitution pending an appeal, can recover the value of the use of whatever part of the premises the defendants occupied, if the judgment is affirmed. *Id.*

See SURETIES, 3; PARTIES TO ACTIONS, 3; BOND, 1.

VACATING DEFAULT.

See DEFAULT, 1, 2.

VENDOR AND VENDEE.

See EQUITY, 6, 7, 8, 9, 10, 1

VERDICT OF JUROR.

1. AFFIDAVITS OF JURORS TO IMPEACH THEIR VERDICT. cannot be received to impeach their verdict, ex arrived at by a resort to the determination of c 257.

VESSELS.

See LIEN, 8.

VOTING.

See CRIMINAL LAW, 25.

WARRANTY.

1. WARRANTY OF TITLE.—A covenant of the grantor, the land sold as "indisputable and satisfactory," is good and valid. *Winter v. Stock*, 407.
2. WARRANTY OF TITLE IN A CONTRACT TO CONVEY.—W in writing with S., agreeing to convey to him a contract warranted the title to be "indisputable sale." S., at the same time, let W. have a sum of purchase. *Held*, that if the title was good and va back the money from S. *Id*.

WATER RIGHTS.

1. INTEREST IN WATER ACQUIRED BY APPROPRIATION.—acquired by one who locates on the bank of a stre waters of the same for machinery, is not property t the right to the momentum of its fall at the poin flow of the water in its natural course above. *Id*
2. EFFECT OF SALE OF WATER IN A STREAM ON PRIOR one who has appropriated a part of the water machinery at a point on the same, makes a conve in the water of the stream to one who has a d thereby lose his prior right to the water which flo as against one who appropriated the water of the his appropriation, but before his sale. *Id*.
3. SAME.—A person who has built a mill on a stream of its water to propel machinery, does not lose his has claimed the water below him for mining pur interest in the water of the stream to be used in a

WILL.

1. WILL AS EVIDENCE.—A will is not a conveyance with Act concerning conveyances, which can be read in tificate of proof, or of acknowledgment by a Nota *diner*, 160.
2. ELECTION OF WIFE TO TAKE UNDER HER HUSBAND'S W the husband, by his will, undertakes to dispose of

common property, as well as his own, to her and others, and she elects to accept the benefits intended and provided for her by the will, she thereby becomes divested of her title in and to the undivided half of the common property, provided an assertion of her community right and interest would necessarily defeat the objects of the will. *Morrison v. Bowman*, 837.

3. **IDEM.**—If, by a just construction of the will, it appears that the testator did not intend to dispose of his wife's share of the common property, her acceptance of a bequest or devise under the will will not operate as an election to relinquish her right to one half of the common property. *Id.*
4. **ACCEPTANCE OF BENEFITS UNDER THE WILL IS A CONFIRMATION OF IT.**—Though a testator has not the power to dispose of the property of another person by his will, still if he undertakes so to do, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the testamentary dispositions of the testator. *Id.*

See COMMON PROPERTY, 2.

WITNESS.

1. **CROSS EXAMINATION OF A WITNESS.**—It is not irrelevant to inquire of a witness on cross examination, for the purpose of impeaching him, whether he has not on a former occasion given a different account of the matter. *People v. Robles*, 421.
2. **WHEN ERROR OF COURT IMMATERIAL.**—The error of refusing to allow a witness to be asked on cross examination whether he has not formerly made different statements from what he then does, is not cured because his testimony is corroborated by other witnesses. *Id.*
3. **EXCLUSION OF WITNESSES DURING A TRIAL.**—The exclusion of the witnesses on the part of the prosecution, on the motion of the defendant, in a criminal action, is not a matter of absolute right, but rests in the discretion of the Court. *People v. Garnett*, 622.
4. **IMPEACHMENT OF WITNESS.**—A witness cannot be impeached by proof that he has made statements out of Court contrary to what he has testified to on the trial, unless the witness was asked as to the statements made out of Court, and the time when, place where, and person to whom made. *Id.*

WRIT OF RESTITUTION.

See SHERIFFS, 1, 2; EJECTMENT, 8, 9; EVIDENCE, 15, 16; UNDERTAKING.

RULES OF COURT

As Amended at the July 1

RULE XXXIV.

All applications to this Court for peremptory writs must be noticed for the first day of the term and shall require the respondent to serve and file the answer within the time hereinafter specified, and notify the applicant to be heard on the moving papers on the first day of the term. Where the respondent resides in the Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, Twelfth, Thirteenth, or Fifteenth Judicial District, a notice of application together with a copy of the affidavit on which the application will be based, shall be served on the respondent at least fifteen days before the first day of the term; and where the respondent resides in the First Judicial District, twenty days before said day. After such service, the said notice, affidavit, and moving papers together with the evidence of service, shall be filed by the applicant with the Clerk of this Court. In all cases, after service of said affidavit and notice, a notice of fifteen days is required, and in all other cases, the respondent shall file a copy thereof on the applicant or his attorney.

RULE XXXV.

When the application is for an alternative writ, upon which the application is made, the applicant shall file a copy of the application with the Clerk of the Court before the issuing of the writ.

of the same shall be served with the writ. The writ shall command the party to do the act required to be performed, or show cause why he has not done so by filing his answer thereto within the time to be specified in said writ, as hereinafter provided, and shall notify the respondent that on failure so to do, the application for the peremptory writ will be heard on the papers of the moving party on the first day of the next succeeding term, or upon such day in term as may be appointed by the Court, when a special return day has been inserted by order of the Court. If the respondent resides in any one of the Judicial Districts mentioned by their respective numbers in Rule Thirty-Four, the return day specified in the writ shall be fifteen days after service of a copy of the writ and affidavit aforesaid; if a resident of any other Judicial District, twenty days; or if the Court, by order, appoint a special return day, then the day so appointed. Within the time so designated for the return of said writ the respondent shall either do the act required to be performed, or file with the Clerk of this Court his answer to the writ and affidavit, and serve a copy thereof on the applicant for said writ.

RULE XLI.

The proof of service of notice and affidavits, or writ and affidavits, shall be the same as the proof of service of summons in civil cases. After the return day has passed, after filing due proof of service of notice and affidavits in an application for a peremptory mandate, or of the affidavits and alternative writs, when the alternative writ has been issued, as provided by these rules, and that no answer has been served and filed as herein provided, upon application of the moving party the Clerk shall place the cause upon the calendar for hearing on the first day of the term, or such other day as may be specially appointed by the Court, upon the papers of the applicant, and the application shall be heard upon such papers, unless the Court, upon motion or notice and affidavits, shall relieve the respondent from his default and permit an answer to be filed on the ground of mistake, accident, surprise, or other excusable neglect.

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THE TWELFTH VOLUME OF CALIFORNIA REPORTS.

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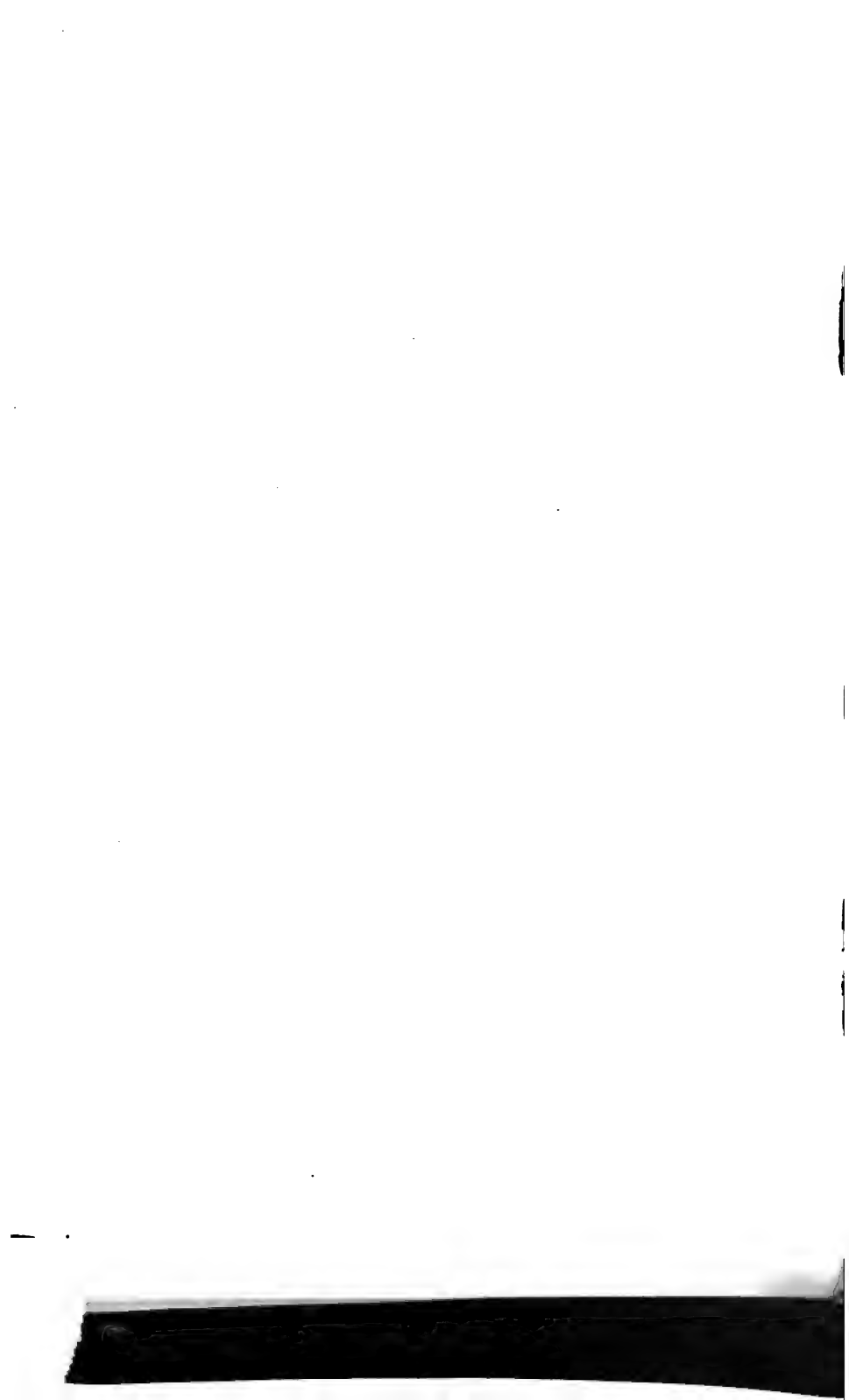
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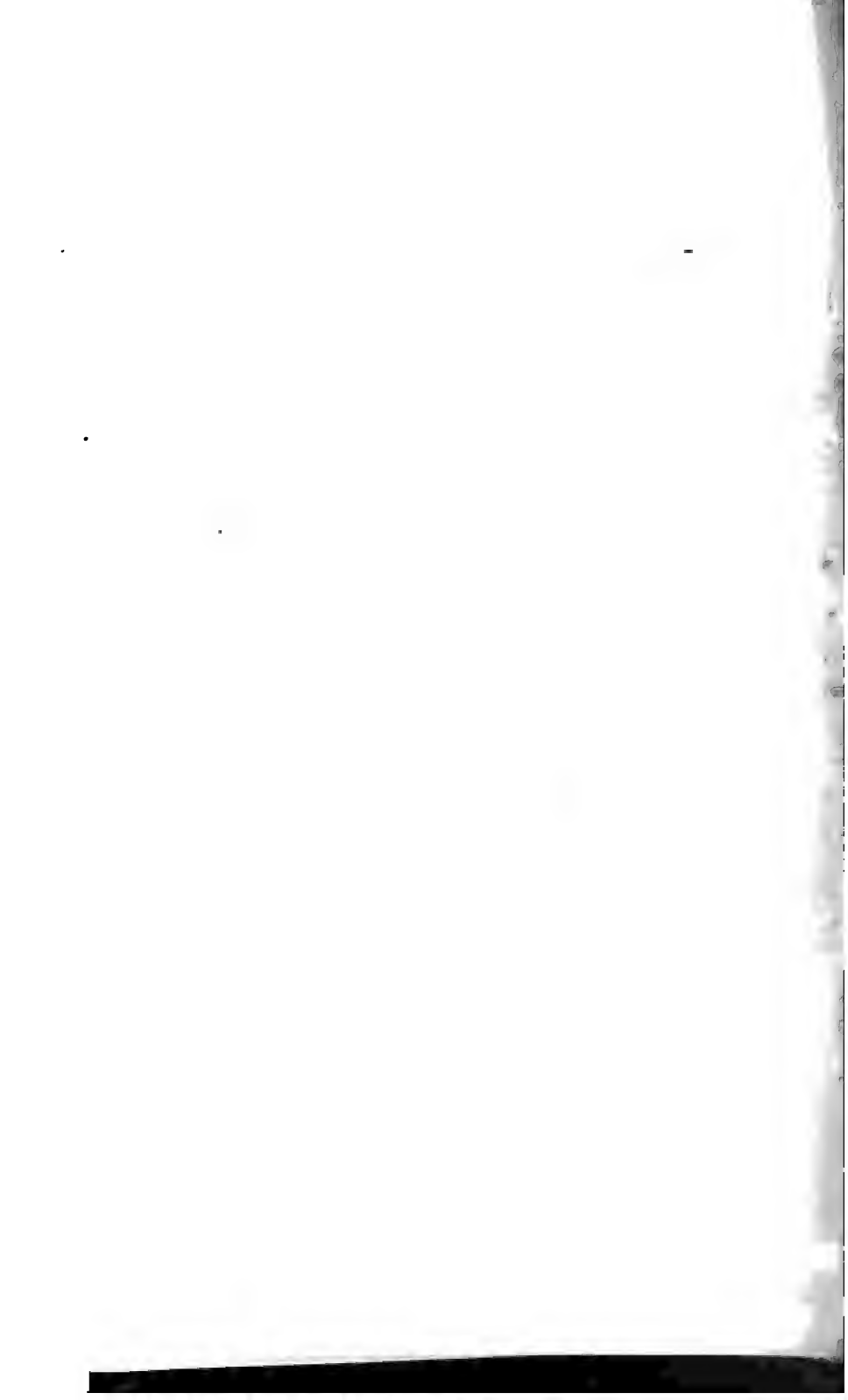
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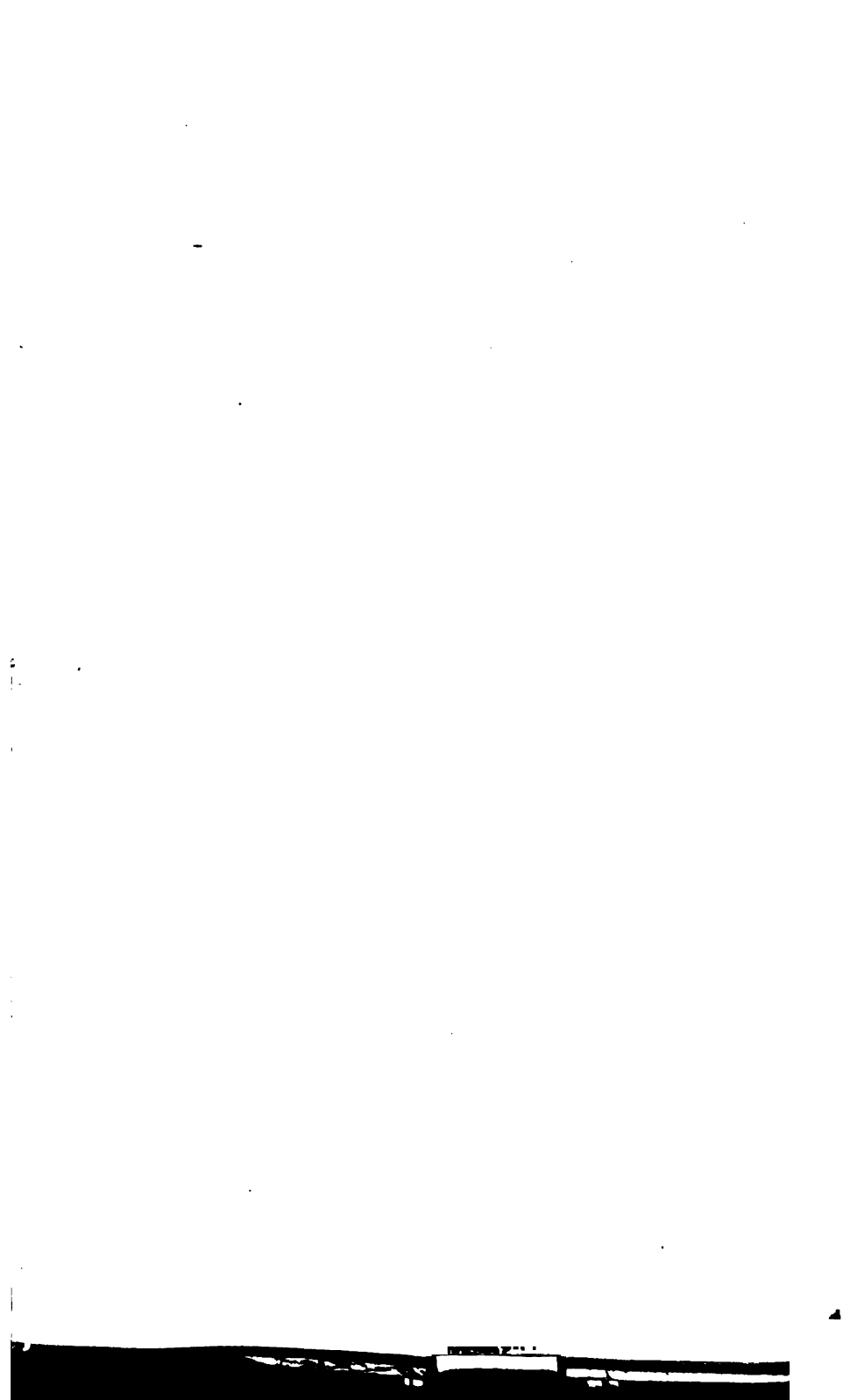
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VOLUME XX

By JOSEPH A. JOYCE

Revised to include citations to Volume 147, by O

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Cited in *Royce v. Hampton*, 16 Nev. 34, approving the principle. Cited, also, in 29 Am. St. Rep. 869, note.

Statute of Limitations applies alike to actions in law and equity, pp. 34, 46.

Cited in *Duff v. Duff*, 71 Cal. 529, 530, but referred to only generally as supporting the principle; *Castro v. Geil*, 110 Cal. 296; 52 Am. St. Rep. 87, in substantial affirmance; *Hale v. Coffin*, 120 Fed. 474, where right to enforce stockholder's statutory liability is barred at law, equity will apply same limitation; *Humphrey v. Carpenter*, 39 Minn. 166, to the same effect; in *Case of Broderick's Will*, 21 Wall. 518, with approval; also in 12 Am. Dec. 369, note.

Statute of Limitations.—Three year period applies in action based on fraud, p. 44.

Distinguished in *Murphy v. Crowley*, 140 Cal. 147, holding five year period applicable in action based on fraud, under facts stated; *Larsen v. Utah Loan etc. Co.*, 23 Utah. 458, applying rule in action against bank for fraud in loaning special deposit without security.

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Cited, *Castro v. Geil*, 110 Cal. 295; S. C. 52 Am. Rep. 446, to the point that it is not necessary to negate matters of defense; *Zieverink v. Kemper*, same point as the principal case; and *Dannem Rep. 102*; S. C. 8 Sawy. 58, in affirmance. Cited 95 Am. Dec. 98, 161, note; and 1 Am. St. Rep. 7

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Cited in *Currey v. Allen*, 34 Cal. 258; *Parker S. C. 59 Am. Rep. 841*; *Zieverink v. Kemper*, 50 v. Bearden, 50 Tex. 127; and *Morgan v. Morgan* with approval of the doctrine. Cited to ruling Rep. 47, note.

29 Cal. 47-72. **HAGER v. SHINDLER.**

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Cited in *Ferris v. Irving*, 28 Cal. 649, in affirmance; *Lynch*, 29 Cal. 190, with approval; *Marshall v. Marshall*, but only in connection with the fact that a certain was a cloud on title, but the record did not so involve; *Arrington v. Liscom*, 34 Cal. 389, S. C. following the principle; *Lick v. Ray*, 43 Cal. 88, following *Friedman*, 49 Cal. 284, where the jurisdiction in certain proceedings in the probate court was affirmed of the principle; in *Archbishop of S. F. v. Shipman* in conflict with the ruling there, that a court could join a foreclosure sale as a cloud on title; *Judges 507, 510*, where it was declared that if a certain to hinder and delay a creditor it was a cloud on title removed; and in *Stock Growers' Bank v. Newcomb* in affirmance. So, also, in *Grove v. Jennings*, 46 K. C. P. R. R. Co., 2 Sawy. 514; and *In re Beadle*, *Wagner v. Law*, 3 Wash. St. 507, 510, 511; S. C. 64, 65, holding that a judgment creditor who is not may maintain an action to set aside a fraudulent quiet title to the land; *In re Estes*, 3 Fed. Rep. 464, to the same point as the principal case, but related to the lien of a judgment where a fraud against creditors, was made; and *Northern P. R. Co. v. 230*, where the principle was approved in discussing a bill for equitable relief against an invalid purchase. Cited to ruling stated, in 56 Am. Dec. 36

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Cited in *Hills v. Sherwood*, 48 Cal. 392, in affirmance; *Aveline v. Ridenbaugh*, 2 Idaho, 160, in dissenting opinion to the same general point; and in 56 Am. Dec. 356, note, to the ruling stated.

Cloud on Title.—Right of action by purchaser at sheriff's sale does not depend on execution returned nulla bona, p. 56.

Cited in 90 Am. Dec. 289, note, to the same point in connection with "creditors' bills and proceedings in equity in aid of executions—1. Prerequisites to creditors' suits."

Same.—Purchaser at sheriff's sale who files a bill to set aside a fraudulent deed of the judgment debtor need not aver his insolvency, pp. 58-60.

Cited in *First Nat. Bank v. Maxwell*, 123 Cal. 372, 69 Am. St. Rep. 72, holding intent to defraud established; *Banning v. Purinton*, 105 Iowa, 645, holding finding as to grantor's insolvency not necessary in such action; *Bull v. Ford*, 66 Cal. 178, holding that an allegation that the conveyance was made "with intent to hinder, delay, and defraud" the creditor was sufficient in the absence of a special demurrer; *Judson v. Lyford*, 84 Cal. 508, with approval. So, also, in *Bull v. Bray*, 89 Cal. 300; *Ogden State Bank v. Barker*, 12 Utah, 24, holding that insolvency need not be expressly alleged where the fact is apparent from the whole bill; *Wilson v. Spear*, 68 Vt. 148, holding that the condition of his estate is immaterial where the grantor has conveyed to defraud creditors; 79 Am. Dec. 218, note; and 90 Am. Dec. 289, extended note, fully discussing the question of prerequisites to creditors' suits.

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Cited in *Chalmers v. Sheehy*, 132 Cal. 462, 84 Am. St. Rep. 64, on point that statute does not begin to run against execution purchaser's right to set aside prior transfer until issuance of sheriff's deed to him; *Stewart v. Thompson*, 32 Cal. 263, in affirmance, even though the conveyance is asked to be set aside because made to defraud creditors; *Goodenow v. Parker*, 112 Cal. 145, in affirmance of the rule, but the case there was held, however, to be governed by section 318 of the Code of Civil Procedure, and not by section 338, subdivision 4, of the Code of Civil Procedure; *Jackson v. Holbrook*, 36 Minn. 504; S. C. 1 Am. St. Rep. 691, quoting from the principal case on this point; *Wagner v. Law*, 3 Wash. St. 513, 517; S. C. 28 Am. St. Rep. 70, with approval; and *Morgan v. Morgan*, 10 Wash. St. 107, distinguishing the principal case, but holding that the action there being one to set aside a deed of community land fraudulently obtained, was within the three years' limitation statute.

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fidentially made, or to information foreign to matter of employment or respecting foregone employment, pp. 61, 69, 70, 72.

Cited, *Sharon v. Sharon*, 79 Cal. 678, where the question is fully considered as to what communications are confidential; *State ex rel. v. Gleason*, 19 Oreg. 162, where certain communications were admitted as not privileged; *Koerber v. Somers*, 108 Wis. 504, 506, admitting evidence of attorney as to settlement made by him under client's authority; *State v. Snowden*, 23 Utah, 326, protection given to privileged communications applies to conversations with an attorney in negotiating to employ him.

General Citation.—*Water Works v. San Francisco*, 82 Cal. 321, S. C. 16 Am. St. Rep. 134, in dissenting opinion, to the point that it is not sufficient to aver fraud in general terms, but the facts must be alleged; *Preston-Parton Mill Co. v. Dexter*, 22 Wash. 240.

29 Cal. 72-75. **HOWE v. INDEPENDENCE CO.**

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Cited, *Bailey v. Taaffe*, 29 Cal. 424, to the same point and explaining the meaning of the word "discretion"; *Chamberlain v. Co. of Del Norte*, 77 Cal. 151, in affirmance. So, also, in *Buell v. Emerich*, 85 Cal. 117; *Enright v. Grant*, 5 Utah, 344, and 58 Am. Dec. 394, extended note on subject.

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Cited in *Bailey v. Taaffe*, 29 Cal. 427; *Leet v. Grants*, 36 Cal. 289; *Heerman v. Sawyer*, 48 Cal. 563; and *Erpenbach v. Chicago etc. Ry. Co.*, 8 S. Dak. 578, all in affirmance.

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29 Cal. 75-96. **EMERY v. BRADFORD.**

Street Assessments under act of 1862 for improvement of streets in San Francisco are constitutional, p. 82.

Cited in *Walsh v. Matthews*, 29 Cal. 124, in affirmance; *Chambers v. Satterlee*, 40 Cal. 514, expressly approving the ruling. So, also, in *Mahoney v. Braverman*, 54 Cal. 568; *Jennings v. Le Breton*, 80 Cal. 15, as having been repeatedly affirmed; *Sims v. Hines*, 121 Ind. 537, to the point that the legislature has power to declare what questions shall be tried on appeal from judgments as to street assessments or to declare that there shall be no appeal; and *State ex rel. v. Dodge Co.*, 8 Neb. 130, S. C. 30 Am. Rep. 823, to the same point in connection with the construction of a constitutional provision for a delegation of power to assess for local improvements.

Assessments.—*Superintendent of streets* is agent of city for con-

contracting for street improvements and for approving and accepting the work for the city, p. 83.

Cited in *Taylor v. Palmer*, 31 Cal. 248, to a like point in discussion of the assignability of a contract to do street work; *Beaudry v. Valdez*, 32 Cal. 279, to the same point; and *Chance v. City of Portland*, 26 Oreg. 293, to the same effect.

Street Work.—Acceptance by superintendent is conclusive that the work was done according to contract and in accordance with the ordinance, pp. 83, 87.

Cited in *Cochran v. Collins*, 29 Cal. 130, in affirmance; *Chambers v. Satterlee*, 40 Cal. 520, to the same point; *Chance v. City of Portland*, 26 Oreg. 293, to the point that such acceptance is conclusive; *Berwind v. Galveston etc. Co.*, 20 Tex. Civ. App. 429, but holding rule aliter in case of total failure to perform work specified.

Street Assessment is a Tax, p. 84.

Cited in *Beaudry v. Valdez*, 32 Cal. 279, in affirmance; *Santa Barbara v. Stearns*, 51 Cal. 501, to the point that a license fee is a tax as employed in section 838 of the Code of Civil Procedure, and section 6, article 6, of the constitution, but not a tax under section 13, article II, of the constitution; and in *State v. French*, 17 Mont. 59, to the same point as the last citation and quoting therefrom.

Same.—Lot owner is liable on this principle and not on the theory of a contract with the street contractor, pp. 84-87.

Cited in *Hendrick v. Crowley*, 31 Cal. 474, in affirmance; *Nolan v. Reese*, 32 Cal. 485, quoting at length from the principal case with approval; *Meuser v. Risdon*, 36 Cal. 244, in affirmance as having been repeatedly so held. So, also, in *Himmelmänn v. Spanagel*, 39 Cal. 392; *Chambers v. Satterlee*, 40 Cal. 526; *Heft v. Payne*, 97 Cal. 110; and in *Santa Cruz R. P. Co. v. Bowie*, 104 Cal. 288, the doctrine is approved.

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Cited in *Sullivan v. Gage*, 145 Cal. 767, refusing mandamus to compel state board of examiners to audit claim for fees of attorney for receiver of corporation erroneously allowed by court in suit by state to dissolve corporation where board had rejected claim; *People v. Provines*, 34 Cal. 541, but only generally in discussion of the difficulty of determining whether certain powers and duties belong to the legislative, executive, or judicial departments; *Belser v. Hoffschneider*, 104 Cal. 460, where it is declared that "under the decisions of this court the action of the city council in the matter of appeal was clearly judicial."

Assessments.—Remedy for wrong decision of street superintendent in accepting work is by appeal to supervisors, pp. 85-88.

Cited in *Cochran v. Collins*, 29 Cal. 131; and *Taylor v. Palmer*, 31

Cal. 256, both in affirmance; *Beaudry v. Val* that any irregularity in the demand for the s is waived by a failure to appeal; *Smith v. Co* affirmance; *Dougherty v. Hitchcock*, 35 Cal. contract was unauthorized the defect is not cu because the mischief was past remedy when th *Shepard v. McNeil*, 38 Cal. 75, in affirmance; 40 Cal. 520, also so holding; *Himmelmänn v. H* approval; *Jennings v. Le Breton*, 80 Cal. 11, should be taken or objections are waived; *Fan* 188, in affirmance; *Heft v. Payne*, 97 Cal. 110, *Ogden City v. Armstrong*, 168 U. S. 239, holding assessments the statutory remedy is exclusive leaves open jurisdictional questions, a determin by an administrative board does not preclude resorting to judicial remedies. Cited in 53 Am. on the subject.

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Cited in *Walsh v. Matthews*, 29 Cal. 123, v *Palmer*, 31 Cal. 250, as so deciding, but whether respect constitutional was not considered, an that the owner cannot be held liable beyond City of St. Louis v. Allen, 53 Mo. 53, to the length from the last citation; *Hammett v. Phi* to the point as to personal judgment. See 8 Cal. 543; *Warren v. Hopkins*, 110 Cal. 506; 1 656; *Ryan v. Altschul*, 103 Cal. 174; *Wilcox Obispo*, 101 Cal. 508; *Himmelmänn v. Steiner*, v. Hastings, 36 Cal. 292.

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Cited in *Estate of Isaacs*, 30 Cal. 113, to th in *Schadt v. Heppe*, 45 Cal. 437; and *Durland*

Homestead, When Set Apart by probate co part of assets of estate, pp. 103, 104.

Cited in matter of *Estate of Wixon*, 35 Cal. So, also, in affirmance in *Rich v. Tubbs*, 41 C 54 Cal. 228; *Estate of Burton*, 63 Cal. 38; and 210; S. C. 13 Am. St. Rep. 117.

Homestead.—Survivor or survivors take su existing at death of husband, but free from all

Cited in *Brown v. Orr*, 29 Cal. 122, in connection with the right to have a mortgage foreclosed; *Schadt v. Heppe*, 45 Cal. 437, in affirmance; and in *Durland v. Seiler*, 27 Neb. 37, to the same effect.

Mortgage.—District court has jurisdiction to enforce mortgage lien on homestead, p. 104.

Cited in *Rich v. Tubbs*, 41 Cal. 36, but only generally to this point; *Verdier v. Bigne*, 16 Oreg. 210, to the same effect; and cited to ruling stated in 81 Am. Dec. 146, note.

29 Cal. 104-111. **SEALE v. FORD.**

Mexican Grant.—Confirmed survey of confirmed grant has effect and validity of patent, pp. 106, 107.

Cited and affirmed in *O'Connell v. Dougherty*, 32 Cal. 462; *Merrill v. Chapman*, 34 Cal. 253; *Morrill v. Chapman*, 35 Cal. 88, both these last citations also holding that such survey takes effect by relation to the date of filing the petition and will prevail over a subsequent patent; *Bernal v. Lynch*, 36 Cal. 145, holding the same as the principal case; *Yates v. Smith*, 38 Cal. 65, in dissenting opinion, to the same point; *Miller v. Dale*, 44 Cal. 575, where the language of the court implies a doubt as to the rule; *Younger v. Pagles*, 60 Cal. 524, in dissenting opinion, to the same effect as the principal case, but in the citing case there was no final confirmation; *Phelan v. Poyoreno*, 74 Cal. 452, but only generally to the point that the holders of perfect grants could present for confirmation but were not bound to do so; and *Le Roy v. Carroll*, 3 Sawy. 68, in affirmance.

Jurisdiction.—Causes transferred under amended constitution to new courts could be taken up at that stage of proceeding reached at time of transfer, pp. 109, 110.

Cited in *Smith v. Tosini*, 1 S. Dak. 637, quoting with approval and holding to the same effect.

29 Cal. 112-119. **SAN FRANCISCO AND S. J. R. R. CO. v. MAHONEY.**

Appeal lies in proceedings to condemn lands to the use of a corporation, p. 115.

Cited in *Appeal of Houghton*, 42 Cal. 68, as supporting the point that the supreme court entertains jurisdiction of special cases both where the statute provides for appeal and where it does not.

Eminent Domain.—Owner is entitled to compensation when land is "taken," pp. 116-118.

Cited in note, 73 Am. Dec. 584, as citing on this point *Bensley v. Mountain Lake W. Co.*, 13 Cal. 306; S. C. 73 Am. Dec. 575.

Eminent Domain.—Commissioners should ascertain value of land, and have no power to make apportionment nor determine title, p. 118.

Cited in *San Diego etc. Co. v. Neale*, 78 Cal. 72, as so deciding, but noting the change in that the court or jury determined the compensation, but holding that the question of value is still distinct from that of ownership.

General Citation.—*Fox v. W. P. R. R. Co.*, 31 Cal. 548, as relied on by counsel but the court said "the point here made was not made in that case and was not considered."

29 Cal. 120-122. **BROWN v. ORR.**

Note of Married Woman executed jointly with her husband is the husband's note, and there can be no personal judgment thereon against her. pp. 121, 122.

Cited in *Althof v. Conheim*, 38 Cal. 233; S. C. 99 Am. Dec. 364, where the principle was affirmed in a case where a married woman borrowed money: *Kantrowitz v. Prather*, 31 Ind. 103; S. C. 99 Am. Dec. 596, to the same point and holding that a married woman's separate property cannot be bound upon her contract unless her intent to deal with and bind the property clearly appears; and *Vantilburg v. Black*, 3 Mont. 464, holding that a judgment on a married woman's note was erroneous and not void, and considering the defense of coverture. Cited in 85 Am. Dec. 145, note.

Mortgage may be foreclosed against estate of deceased, p. 122.

Cited in 81 Am. Dec. 146, note, to the same point.

General Citations.—*Davanay v. Eggenhoff*, 43 Cal. 397, holding that if an unverified complaint on a note sets out a copy and avers that it has not been paid a general denial only puts in issue the fact of payment; *Wetmore v. San Francisco*, 44 Cal. 300, holding that under a general denial payment may be proved; and *Maudlin v. Ball*, 5 Mont. 99, as to the effect of a general denial and purporting to quote from the principal case, but this is error, as the quotation is in fact from *Davanay v. Eggenhoff*, 43 Cal. 397.

29 Cal. 123-124. **WALSH v. MATTHEWS.**

Assessments.—Acceptance of street superintendent is conclusive as against introduction of evidence that work was not done according to contract, p. 124, by reference to *Emory v. Bradford*, 29 Cal. 75.

Cited in *Cochran v. Collins*, 29 Cal. 131, in affirmance.

Same.—Act of 1862 for improvements of streets in San Francisco is constitutional, p. 123.

Cited in *Chambers v. Satterlee*, 40 Cal. 514, with approval. So, also, in *Mahoney v. Braverman*, 54 Cal. 568, and in *State ex rel. v. Dodge Co.*, 8 Neb. 130; S. C. 30 Am. Rep. 823.

Same.—Contractor is entitled to personal judgment against owner

to amount of assessment for work done on street in front thereof, p. 124.

Cited in *Hammett v. Philadelphia*, 65 Pa. St. 186, to the same point.

Cross-reference.—*Emery v. Bradford*, 29 Cal. 75-96.

29 Cal. 124-128. HARRIS v. MCGREGOR.

Corporation.—Certificate must show substantial compliance with statutory conditions before corporation can be considered in issue, pp. 127, 128.

Cited in *Pacific Bank v. De Ro*, 37 Cal. 542, and explained and distinguished in that the statute there was not in the principal case, that statute prohibiting an inquiry into the right of a de facto corporation to exercise corporate powers; *McCallion v. Hibernia S. and L. Soc.*, 70 Cal. 168, where the certificate was held not proof of a corporation in esse; *Fresno etc. Co. v. Warner*, 72 Cal. 384, but declared not in point, that case holding that one who has contracted with an apparent corporation as such is estopped in an action on the contract from denying its existence; dissenting opinion in *People v. Reclamation Dist.*, 121 Cal. 529, on point that state is not estopped from denying corporate existence; *Los Angeles etc. Co. v. Spires*, 126 Cal. 544, quoting *McCallian v. Hibernia etc. Soc.*, 70 Cal. 168; *Bates v. Wilson etc. Co.*, 14 Colo. 157, in affirmance; *Bigelow v. Gregory*, 73 Ill. 201, to the same effect; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 110, S. C. 41 Am. Rep. 87, but only generally as to compliance with statutory requirements; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 637; S. C. 59 Am. Rep. 853, in affirmance; *Capps v. Hastings Prospecting Co.*, 40 Neb. 475; S. C. 42 Am. St. Rep. 680, to the same effect, holding that a failure to file articles of incorporation gives the corporation no valid existence de jure; 73 Am. Dec. 661, note; 33 Am. St. Rep. 177, 181, extended note, to the same point, also as to collateral attacks and analogous points.

Corporations.—Operations may be carried on in one county and its principal place of business be in another, p. 128.

Cited in *Creditors v. Consumers L. Co.*, 98 Cal. 319, quoting from the principal case in connection with parol evidence to show in what county an alleged insolvent corporation had its place of business.

Action to Recover Real Estate brought on prior possession of plaintiff, defendant who is a mere trespasser, cannot justify by showing true title in a third person, p. 129.

Cited in 70 Am. Dec. 620, note, as citing *Bird v. Lisbros*, 9 Cal. 1, and 70 Am. Dec. 617, note, to this point.

29 Cal. 129-131. COCHRAN v. COLLINS.

Street Work.—Resolution of intention need not be signed by mayor of San Francisco under Act of 1862, p. 131.

Cited in *Taylor v. Palmer*, 31 Cal. 244, and Cal. 473, both in affirmance.

Assignment—Street Assessments.—Demandable, p. 131.

Cited in *Taylor v. Palmer*, 31 Cal. 248, and Co., 3 S. Dak. 438, both in approval.

29 Cal. 131-137. **LONG v. NEVILLE.** S. C. Dec. 203.

Ejectment—Writ of Restitution.—Sheriff sh who come into possession pending suit unless to defendants, pp. 135, 137.

Cited in *Mayne v. Jones*, 34 Cal. 490, in affirmance; 125 Cal. 156, discussing burden of proof and resisting writ; *Rogers v. Parish*, 35 Cal. that persons would not be dispossessed who action and who did not enter into possession action; *Long v. Neville*, 36 Cal. 460, S. C. 95 A point as the principal case; *Ford v. Doyle*, 37 Cal. writ would not be executed against strangers v. Muir, 64 Cal. 453, with approval, and so 1 Harrington, 41 Mo. App. 445, in affirmance; 3 tended note; and referred to in 95 Am. Dec. 2

Notice of Lis Pendens does not apply to ej tions operating directly upon title, p. 135.

Cited in *Partridge v. Shepard*, 71 Cal. 476, no Empire etc. Co. v. Engley, 18 Colo. 393, to the cipal case and holding that the notice of lis p in actions to foreclose mechanics' liens; and 56

29 Cal. 138-139. **CHASE v. BERAUD.**

Sureties on Appeal Bond are liable on volunt ant or consent to motion of respondent, p. 138.

Cited in *Hitchcock v. Caruthers*, 100 Cal. 103 bility upon dismissal by consent; *State v. Bis* the same effect; *id.* 18, in dissenting opinion; 36 Neb. 86, 87; S. C. 38 Am. St. Rep. 699, holdi discharged by the substitution of other parties tinuance granted by consent nor by a rendition ulation; and 38 Am. St. Rep. 708, extended no various points involved in this connection.

29 Cal. 139-142. **LYONS v. LEIMBACK.**

Findings.—Prior to 1861 findings by the cour facts necessary to constitute a basis for the ju

same point.

If Findings by the Court are defective as not containing all necessary facts application should be made below to amend the same or the judgment will not be reversed on appeal, pp. 140-142.

Cited in *State v. Manhattan S. M. Co.*, 4 Nev. 337, in affirmance. So, also, in *Warrén v. Quill*, 9 Nev. 264, under a similar statute as that of 1861.

Findings.—Presumption is that facts not found were proved unless court below on application has not supplied the defect, pp. 141-142.

Cited in *Lucas v. City of San Francisco*, 28 Cal. 597, in affirmance; *James v. Williams*, 31 Cal. 213, to the point that the court is presumed to have found the facts necessary to sustain the judgment; *Bernal v. Gleim*, 33 Cal. 676, with approval; and *Poppe v. Athearn*, 42 Cal. 617, as having been repeatedly so held.

29 Cal. 142-147. **HUNSAKER v. STURGIS.**

Pledgor, if debt is paid, is entitled to income, profits, and surplus realized, p. 145.

Cited in *Smelting Co. v. Reed*, 23 Colo. 534, in affirmance; and 49 Am. Dec. 735, extended note.

If **Pledgee Who is Agent** to sell becomes agent of purchaser, it is a breach of trust, and he is bound to account to pledgor for amount received including personal compensation, pp. 145-147.

Cited in *Blood v. La Serena L. and W. Co.*, 113 Cal. 236, in dissenting opinion, affirming the principle as applied to a broker.

29 Cal. 147-150. **COMMISSIONERS S. J. v. YOUNGER.** 87 Am. Dec. 164; S. C. 29 Cal. 172.

Attorney at Law.—Right of attorney of record to manage and control cause cannot be questioned by opposite party, p. 149.

Cited in *Willson v. Cleaveland*, 30 Cal. 200, holding that the court will not strike out answer signed by attorney of record, and will not inquire whether it was put there by himself or his associate; *Clark v. Willett*, 35 Cal. 538, explained and distinguished, the question there being the power of the court to inquire as to the retainer of an attorney upon a suggestion of abuse of office; *Mott v. Foster*, 45 Cal. 72, in affirmance; *Merritt v. Campbell*, 47 Cal. 546, holding that a retraxit must be made by the attorney of record and not by plaintiff; *Jones v. Spears*, 56 Cal. 165, holding that the principal case is not in conflict with the right of the plaintiff to order issuance of execution; *Westbay v. Gray*, 116 Cal. 666, to the point that authority as to a retraxit is conferred upon the attorney of record; *Wylie v. Sierra Gold Co.*,

120 Cal. 487, stipulation of party disregarded; 56 Miss. 90, in affirmance; 30 Am. Rep. 359, attorney to manage and control a case; and 11 as to right to question attorney's power to

Same.—Party who appears by attorney cause, p. 149.

Cited in *Crane v. Crane*, 121 Cal. 100, as to *Crescent etc. Co. v. Montgomery*, 124 Cal. 118, 128 Cal. 560, 79 Am. St. Rep. 71, as to personment; *Coonan v. Loewenthal*, 129 Cal. 200, held present. by attorney's stipulation at trial; 1 App. 626, holding client bound by attorney's at trial; *Bonnifield v. Thorp*, 71 Fed. Rep. 920 approval; and 51 Am. St. Rep. 262, extended

Same.—Client cannot dismiss action if attorney assent, pp. 149, 150.

Cited, *Mott v. Foster*, 45 Cal. 72, applying if signed by the client granting time to file a statement attorney was temporarily absent from the court; *Superior Court*, 95 Cal. 226, but distinguished in that counsel did not object to dismissal "but only on account of their fee; and in *Pe* 921, quoting at length from the principal case that compromises etc. of clients without attaching them as evidence.

General Citations.—*Marriner v. Dennison*, 71 583, note, as to right of party to change his principal case 87 Am. Dec. 166; so, also, 43 Am.

29 Cal. 150-155. GRADWOHL v. HARRIS.

Assignee may sue in his own name and recovery assignment was only a portion of demand, p. 150.

Cited in *Cobb v. Doggett*, 142 Cal. 145, sustaining judgment; *Greig v. Riordan*, 99 Cal. 323, 1 of a demand for collection can sue in his own name; *Commissioners v. Jameson*, 86 Ind. 164, but only the right of an assignee to sue; also in 34 Am.

Intervention.—Assignor may intervene to protect his claim or he is bound by the judgment.

Cited in *Stingley v. Nichols*, 131 Ind. 218, 1 right of a county to intervene on appeal from ditch assessments; also in 16 Am. Dec. 182, extended. 574, note.

Pleading.—Demurrer to complaint for ambiguity or uncertainty should specially point out the same, p. 157.

Cited in *Yolo Co. v. City of Sacramento*, 36 Cal. 196; *Demartin v. Albert*, 68 Cal. 279; and *Kirsch v. Derby*, 96 Cal. 605, all in affirmance; so in *Palmer v. Utah and N. Ry. Co.*, 2 Idaho, 293, to the same effect; *Sharpleigh etc. Co. v. Knippenberg*, 133 Cal. 311, holding demurrer insufficient and improperly sustained.

Nuisance.—Private action lies to abate a public nuisance in case of special damage where free use of private property is injured, but if injury only affects plaintiff in common with public at large he has no private action, p. 159.

Cited in *Yolo Co. v. City of Sacramento*, 36 Cal. 195, in affirmance. So, also in *Grigsby v. Clear Lake Water Co.*, 40 Cal. 406. Cited in *Shirley v. Bishop*, 67 Cal. 546, to the same point; *San Jose Ranch Co. v. Brooks*, 74 Cal. 466, 467, but declared not in point as the facts were different although the principle was approved; *Gardner v. Stroeve*, 89 Cal. 29, in affirmance. So, also, in *Hargo v. Hodgdon*, 89 Cal. 628; Cited in *Fisher v. Zumwalt*, 128 Cal. 496, holding private action maintainable for abatement of noxious gases; *San Francisco Sav. Union v. Petroleum Co.*, 144 Cal. 138, 139, sustaining action by littoral proprietor whose right of access has been obstructed; *Cereghino v. Oregon etc. Railroad*, 26 Utah, 481, upholding right of private citizen specially damaged to enjoin laying of railroad track in a street across sidewalk without lawful authority; *Redway v. Moore*, 2 Idaho, 1043, to the point that the code has not changed said rule; *Fogg v. N. C. O. Ry.*, 20 Nev. 435, in affirmance; *Williams v. Tripp*, 11 R. I. 453; and *Shepard v. Barnett*, 52 Tex. 641, both to the same point with approval and in the latter case it was also held that the special injury was sufficiently alleged. Cited in 31 Am. Dec. 132, 134, extended note.

Nuisance.—The question whether certain obstructions amount to a nuisance or not is one of fact, p. 159.

Cited in *Requena v. City of Los Angeles*, 45 Cal. 55; *Shirley v. Bishop*, 67 Cal. 546; and in *People v. Park etc. R. R. Co.*, 76 Cal. 161, all in affirmance.

General Citation.—*Courtwright v. Bear R. W. and M. Co.*, 30 Cal. 585, upon the general point of jurisdiction of courts to abate nuisances.

29 Cal. 160-165. **CARPENTIER v. GARDINER.** S. C. 29 Cal. 330.

New Trial.—Remission of damages may be required of plaintiff or the submission to a new trial, p. 163.

Cited, *Prince v. Lynch*, 38 Cal. 531; S. C. 99 Am. Dec. 428, in affirmance; *Davis v. Southern Pac. Co.*, 98 Cal. 17, with approval. So, also,

in *Rosini v. Trowbridge*, 20 Nev. 121. Cited in 122 Cal. 222, noted under *De Costa v. Mining Co*

Tenancy in Common—Ouster.—Denial of cotenancy is evidence of ouster, p. 163.

Cited in *Salmon v. Wilson*, 41 Cal. 610, as being ouster; *Packard v. Johnson*, 57 Cal. 183, as so. The facts of that case it was held that there was no ouster.

Setoff.—Value of improvements cannot in an action be setoff against damages unless defendant asks

Cited in 15 Am. Dec. 352, extended note, to the

Findings may be Vacated as to damages, in an action if they are not justified by the evidence, pp. 163,

Cited in *Tompkins v. Mahoney*, 32 Cal. 235, in principle; *Carpentier v. Small*, 35 Cal. 359, holding that it be granted as the findings were contrary to a finding in *Sichel v. Carrillo*, 42 Cal. 507, but only as bearing of the right of the court to change conclusions of

29 Cal. 165-168. **GAUTIER v. ENGLISH.**

Judgment by Default.—Relief cannot properly be granted in a complaint and if so entered for an excessive amount on appeal, pp. 167, 168.

Cited in *Bond v. Pacheco*, 30 Cal. 535, in affirmance of such judgment; *Parrott v. Dew*, 34 Cal. 220, to the point that it be allowed, in action to foreclose mortgage, if they and *Wilbur etc. Co. v. Maynard*, 6 Colo. 488, in an action not exceeding prayer of complaint. Also in 87 Ariz.

29 Cal. 168-171. **REAY v. COTTER.**

Forcible Entry and Detainer does not lie in favor of a landlord against tenant who refuses to attorn, pp. 170,

Cited in *Martel v. Meehan*, 63 Cal. 50, noting that it be before amendment of the statute, but holding that it cannot be brought against an executor under section 124 of Civil Procedure; and *Winterfield v. Stauss*, 24 Cal. 400, in an extended discussion of the common-law rule, but held

Estoppel.—Tenant may deny title of vendee of land.

Cited in *Tewksbury v. Magraff*, 33 Cal. 245, as an exception to the general rule; *Felton v. Millard*, 10 Cal. 300, pointing out that title is not in issue in unlawful detainer; *Votaw*, 13 Mont. 405, as authority, but held not applicable.

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the code provision of that state; and *Winterfield v. Stauss*, 24 Wis. 404, in a general discussion as to title and the right to dispute the same, but held inapplicable.

29 Cal. 172-180. **COMMISSIONERS OF S. J. v. YOUNGER.** S. C. 29 Cal. 147.

Equity aids the vigilant and not the idle who with means at hand will not take care of themselves, p. 176.

Cited in *Mastick v. Thorp*, 29 Cal. 449, to the same point as applied to laches.

Contract will not be rescinded for misrepresentation or suppression of truth where parties deal at arm's length without special confidence and have equal means of knowledge, pp. 178, 179.

Cited in *Perkins v. Center*, 35 Cal. 726, in affirmance, the party there seeking relief having had sufficient notice to put her on inquiry; *Senter v. Senter*, 70 Cal. 623, but there in an action to reform a decree of divorce, relief was granted on the ground of misrepresentation in inducing assent to the decree; *Kelly v. Central P. R. R. Co.*, 74 Cal. 563; S. C. 5 Am. St. Rep. 475, but distinguished as being a suit to set aside a contract and not for specific performance; and *Marriner v. Dennison*, 78 Cal. 211, where the court says to the point "that the representations alleged to have been made were not as to existing facts or of such matters as were material or that the plaintiff had a right to rely on" and the rule was approved.

Vendee of Land is not entitled to relief in equity where the sale is by metes and bounds stating the number of acres, and there is a mistake as to the latter, and it appears that quantity was not a principal condition of the contract, pp. 178, 179.

Cited in *Britt v. Marks*, 20 Oreg. 229, to the same effect; so in 37 Am. Dec. 390, note. Distinguished in *Quarg v. Scher*, 136 Cal. 412, holding rescission justified under facts stated.

29 Cal. 180-189. **WALLACE v. MAYOR OF SAN JOSE.**

Municipal Corporations.—Common council of San Jose cannot create a debt without present provision of funds to meet it, pp. 185-188.

Cited in *McBean v. Fresno*, 112 Cal. 168, S. C. 53 Am. St. Rep. 197, substantially affirming the principle; *City of Indianapolis v. Wann*, 144 Ind. 186, with approval; *Mister v. City of Kansas*, 18 Mo. App. 227, where the court said that as the corporation "has paid to the plaintiff the full amount, appropriated she is not liable for any balance in excess of that amount"; *Read v. Atlantic City*, 49 N. J. L. 569, in affirmance; *McAleer v. Angell*, 19 R. I. 694, holding that contracts violating like provisions are void.

Ultra Vires.—Acts of municipal corporation or of its officers in excess

of its powers are void, and those contracting with such corporation are bound to know extent of such powers, pp. 186, 188.

Cited in *Pixley v. Western Pac. R. R. Co.*, 33 Cal. 197, 198, 201, S. C. 91 Am. Dec. 633, 636, in connection with the powers of a railroad corporation and of its president; *Ex parte Frank*, 52 Cal. 608, S. C. 28 Am. Rep. 644, affirming the principle as to acts of a city in excess of its powers. So, also, in *Aid Society v. Reis*, 71 Cal. 633; *Sutro v. Pettit*, 74 Cal. 339, S. C. 5 Am. St. Rep. 445, to the point that the issuance of bonds can only be by virtue of express authority of the legislature; *Sutro v. Rhodes*, 92 Cal. 125, holding that purchasers of municipal bonds are bound to know the corporation's powers and also of its officers; *South Pasadena v. Terminal Ry. Co.*, 109 Cal. 321, holding that a city has no power to bargain with a railroad company regulating rates of transportation except by grant from legislature; and *McAleer v. Angell*, 19 R. I. 694, to the point of strict construction of powers.

29 Cal. 189-192. THOMPSON v. LYNCH.

Injunction.—Sale by administrator of land sold by decedent in his lifetime may be enjoined as a cloud on title, even though complainant is not in possession, pp. 190-192.

Cited in *Porter v. Pico*, 55 Cal. 176, applying the principle to an execution sale, but the owner, however, was in possession; *Lehman v. Shook*, 69 Ala. 499, as so holding as to possession but not followed; *Grove v. Jennings*, 46 Kan. 369, to the point as to possession and approved. So, also, in *Huntington v. C. P. R. R. Co.*, 2 Sawy. 514, and affirmed as to the same point in *In re Beadle*, 5 Sawy. 353.

Pleading.—Administrator may deny on information and belief the execution and delivery of deed of intestate averred in complaint, pp. 190-191.

Cited in *Perkins v. Brock*, 80 Cal. 322, to the point that a denial may be made by a counter-averment; also in 70 Am. Dec. 631, extended note.

29 Cal. 192-193. LEFFINGWELL v. GRIFFING.

Appeal does not lie from order directing statement on motion for new trial to be settled, p. 193.

Cited in *Ketchum v. Crippen*, 31 Cal. 367, holding that an order refusing to strike out a statement on motion for a new trial is not appealable; *Pendegast v. Knox*, 32 Cal. 75, in affirmance, the orders being of the same character. So, also, in *Genella v. Relyea*, 32 Cal. 160; and in *Quivey v. Gambert*, 32 Cal. 305; but this last citation was overruled in *Calderwood v. Peyser*, 42 Cal. 117, citing also the principal case and holding that an appeal may be taken from an order made after judgment striking out a statement on motion for a new trial.

Cited in 60 Am. Dec. 436, extended note, as to "Instances of final and interlocutory judgments and decrees."

29 Cal. 194-200. CURIAC v. PACKARD.

Sureties are released by tender of amount of liability, if it is refused, pp. 197, 200.

Cited in *Daneri v. Gazzola*, 139 Cal. 418, 419, noted under *Hayes v. Josephi*, 26 Cal. 535; *Oppenheimer v. Clunie*, 142 Cal. 321, denying right to cancel lease for fraud, under facts stated; *White's Admr. v. Life Assn. Co.*, 63 Ala. 429, S. C. 35 Am. Rep. 51, applying the principle to the payment of money due on a policy of insurance to a personal representative of insured holding that a surety on a note to the insurer was thereby discharged; *Spurgeon v. Smith*, 114 Ind. 456, in affirmance; so, also, in *Mitchell v. Roberts*, 17 Fed. Rep. 781; S. C. 5 McCrary, 433.

Who are Sureties.—Under the facts of this case the parties were held to be sureties, p. 197.

Cited in *Preston v. Hood*, 64 Cal. 408, as authority for holding the parties in that case to be sureties as well also as by section 540 of the Code of Civil Procedure.

Evidence.—If incompetent testimony is admitted without objection its competency cannot be questioned in appellate court, p. 197.

Cited in *Janson v. Brooks*, 29 Cal. 223, in affirmance.

Undertaking to Release Attachment may be sued on by plaintiff, as he is the real party in interest, p. 200.

Cited in *Commissioners etc. v. Lineberger*, 3 Mont. 238, holding that the county is the real party in interest in an action on a county treasurer's bond; and *McBeth v. Van Sickle*, 6 Nev. 135, holding that the sheriff is not the real party in interest in a suit on a replevin bond.

General Citation.—In *Fox v. Mackenzie*, 1 N. Dak. 307, holding that the effect of such an undertaking as in the principal case is to release the levy and destroy the writ.

29 Cal. 200-210. McDONALD v. ASKEW.

Water Rights.—Right of prior appropriator for mill purposes is not a property in the water as such, p. 206.

Cited in *Nevada etc. Co. v. Kidd*, 37 Cal. 311, with approval; also in 58 Am. Dec. 411, note; 76 Am. Dec. 479, note.

Same.—Mill owner has right to momentum of fall at point of location and to natural flow above, p. 206.

Cited in *Alder Gulch C. M. Co. v. Hayes*, 6 Mont. 38, as sustaining the point of the right of miners working in the same gulch to have surplus water discharged for use below; also in 58 Am. Dec. 411, note.

29 Cal. 210-214. PEOPLE v. PACHECO.

Parties.—Mandamus must be in name of r name of the people cannot be used to red people have no interest, p. 213.

Cited in *People v. San Francisco*, 36 Cal. (and holding that the writ would not be dis in the name of some one not interested if tl in the brief in support of the writ; *People* 480, in affirmance; *State ex rel. v. Commissi* ing as to the real party in interest. *Doubt* 2 Mont. 269; cited in *State v. California M* point that although the attorney general ha the supreme court, it will be presumed th appeared below was authorized to act by the *Dakota ex rel. v. Carey*, 2 N. Dak. 39, as a party in interest but holding contra; *State* 530, holding that the mere signature of the public law officer to the bill of a private rel *ex rel. v. Union etc. Co.*, 7 S. Dak. 53, affir the same effect as the principal case; *State* 455, as disaffirmed in *People v. San Francisc*

29 Cal. 214-224. JANSON v. BROOKS.

Forcible Entry and Detainer will not lie ag ing a writ of restitution in good faith thoug pp. 216-222.

Cited in *Thompson v. Smith*, 28 Cal. 532, qu page 221, as to the entry being mala fide as impropriety of going beyond that; *Shelby v.* the point that a peaceable entry in good faith it be wrongful; and *Castro v. Tewksbury*, forcible entry does not lie for a mere trespass

Incompetent Testimony not objected to will on motion for nonsuit and on motion for new

Cited in *Williams v. Hawley*, 144 Cal. 102; *O'Neal*, 16 Cal. 393; *S. P. Co. v. Hall*, 100 F of court to instruct jury to ignore such eviden 81 Cal. 91, as sustaining the point that second to is sufficient; *Jacobsen v. Siddal*, 12 Oreg 362, in affirmance; and *Warder etc. Co. v. In* same effect.

29 Cal. 224-227. ESTATE OF PACHECO.

Law of a Case.—Judgment of supreme o

a case unless there is such a change of conditions as to render its accomplishment impracticable, p. 226.

Cited in *Dodge v. Gaylord*, 53 Ind. 372, in affirmance.

Notice of Appeal from all orders rendered on a day specified covers all appealable orders of that date, p. 226.

Cited in *Estate of Keane*, 56 Cal. 409, and explained in that the appeal was taken under a statute which authorized an appeal from an order refusing to revoke letters testamentary and also declared not in point. Referred to in *Sharon v. Sharon*, 68 Cal. 337, where it is said that there is nothing in the principal case and other cited cases to indicate that a notice of more than one appeal may not be in the same paper; and *In re Dewar's Estate*, 10 Mont. 424, holding that it is no objection in an appeal from an order sustaining objections to a final account and from an order entering a decree of distribution that two separate actions have been united in one appeal.

29 Cal. 227-237. **SOLOMON v. MAGUIRE.**

Execution.—Time within which it may issue is not extended by order staying proceedings, pp. 236-237.

Cited in *Cortez v. Superior Court*, 86 Cal. 278; S. C. 21 Am. St. Rep. 38, so holding; *Buell v. Buell*, 92 Cal. 397, holding that the time during which execution is stayed should not be excluded from the computation of five years; *Smith v. Schwartz*, 21 Utah, 134, construing local statutes; and as limiting *Dewey v. Latson*, 6 Cal. 134, and *Englund v. Lewis*, 25 Cal. 352, and see, also, *Savings etc. Co. v. Bear Val. etc. Co.* 89 Fed. 39.

29 Cal. 238-243. **DUPUY v. SHEAR.**

Mode of Commencing Suits is regulated by statute and not by common law, p. 239.

Cited in *Adams v. Patterson*, 35 Cal. 125, but only generally in discussion as to the commencement of an action in connection with the statute of limitations and also to the point that at common law an action is commenced by issuing a writ; *Walker v. Goldsmith*, 14 Oreg. 184, in dissenting opinion to the point that in California under the statute an action is commenced by filing a complaint and issuing of summons, but the question as to when a suit is commenced in connection with the point where notice of lis pendens begins was not decided; and so in 15 Am. Dec. 346, extended note, as to commencement of action generally.

Commencement of Action.—Summons must issue within one year under act of 1860 and not thereafter without order of court, pp. 239-241.

Cited in *Reynolds v. Page*, 35 Cal. 301, in dissenting opinion, but distinguished; but that case substantially holds to the same effect as to issuing summons within one year; *Ex parte Connoway*, 178 U. S. 426, 428, construing Code of Civil Procedure, sections 405, 406, 416; *Coombs v. Parish*, 6 Colo. 296, holding that if a summons is not issued within the time limit of the code suit may be dismissed; and *Stevens v. Carson*, 21 Colo. 283, to the same effect as the last citation.

Alias Summons was unknown to the California law. If the court had any power to issue a second summons it was because suit had been commenced, pp. 240, 241.

Cited in *Barndollar v. Patton*, 5 Colo. 47, 48, quoting at length on this point (pp. 240, 241), and holding that a new writ could under the code be awarded by the court when the summons was quashed because defective in form; *Stevens v. Carson*, 21 Colo. 283, quoting from page 241, on this point; *Coffin v. Bell*, 22 Nev. 184, S. C. 58 Am. St. Rep. 740, as so holding, but it was declared unnecessary to decide the point, and holding that if the service of summons is a nullity it may be withdrawn although returned and filed, and another one served.

Action may be Dismissed for want of prosecution, for long neglect, in the discretion of the court, pp. 242, 243.

Cited in *People v. Jefferts*, 126 Cal. 299, 301, as to dismissal of quo warranto proceedings and holding power not limited by Code of Civil Procedure, section 581; *Reynolds v. Page*, 35 Cal. 302, holding that in all cases except for unwarrantable delay the dismissal is governed by the Practice Act, section 148; *Carpentier v. Minturn*, 39 Cal. 451, where there was a dismissal when the services was more than eight years after summons issued; *Coombs v. Parish*, 6 Colo. 296, where there was a dismissal for want of issuance of summons within the time limit of the code; and *Stevens v. Carson*, 21 Colo. 283, but to the point that if such discretion is improperly exercised it is a ground for reversal of dismissal. Cited in 95 Am. Dec. 215, note.

29 Cal. 243-251. **FANJOY v. SEALES.**

Negligence.—Owner of building is liable for injuries, subsequent to acceptance, arising from defective construction, and liability of contractor then ceases. In such cases, the doctrine of respondeat superior has no application, p. 249.

Cited in *Baker v. Kinsey*, 38 Cal. 634; S. C. 99 Am. Dec. 439, holding that the master is liable for such acts only of his servants as are within the line of his duty and execution of his authority; *Du Pratt v. Lick*, 38 Cal. 692, holding that the doctrine of respondeat superior does not apply to those employing independent contractors. So, also, in *Humpton v. Unterkircher*, 97 Iowa, 516. See notes 76 Am. St. Rep. 409, and 68 Am. Dec. 359, note.

29 Cal. 257-264. **PEOPLE v. HUGHES.**

Evidence—Arson to Defraud Insurance Company.—It is sufficient to prove a corporation de facto in such case, pp. 260-262.

Cited in *People v. Barrie*, 49 Cal. 344; *People v. Leonard*, 106 Cal. 310; *People v. Oldham*, 111 Cal. 651; and *State v. Cleavland*, 6 Nev. 185, all affirming the principle as applied to criminal cases.

Same.—In such case it is not necessary to prove that the policy of insurance was valid and could be collected; it is sufficient to prove its delivery to defendant, p. 262.

Cited in *State v. Tucker*, 84 Mo. 25, to the same effect in affirmation; and *Cowan v. State*, 22 Neb. 524, where a certain note and mortgage, executed by accused was held proof of the de facto existence of a bank the charge being that of obtaining money on false pretenses.

Arson—Arrest of Judgment.—Variance in name of insurance company defrauded is not ground for arrest of judgment, p. 262.

Cited in *People v. Oliveria*, 127 Cal. 379, noted under *People v. Boggs*, 20 Cal. 433; *People v. Schwartz*, 32 Cal. 165, but distinguished in that there was in that case a mere averment of the company's name intended to be defrauded.

Verdict.—Affidavits of jurors are not competent to impeach their verdict, p. 262.

Cited in *Goodman v. Cody*, 1 Wash. Ter. 331, S. C. 34 Am. Rep. 810, in affirmance with this qualification—except where the verdict is the result of chance; *Griffiths v. Montandon*, 4 Idaho, 379, affidavits of jurors are inadmissible to impeach verdict unless it is verdict obtained by resort to chance; 24 Am. Dec. 479, note.

Judgment of Imprisonment for a fixed term from time of delivery to warden of penitentiary is not void for uncertainty, p. 263.

Cited in *People v. Burgess*, 35 Cal. 118, in affirmance.

General Citation.—In 81 Am. Dec. 70, extended note, considering numerous cases upon the point as to who may commit arson the principal case upon the facts being an illustration.

29 Cal. 267-273. **JACKSON v. SHAWL.**

Constitutional Law—Pawnbrokers.—The act of 1861 as to rate of interest pawnbrokers may charge does not violate the constitutional provision as to uniform operation of laws, p. 271.

Cited in *Ex parte Lichtenstein*, 67 Cal. 360, 56 Am. Rep. 715, in affirmance; *Youngblood v. Birmingham, T. & S. Co.*, 95 Ala. 526, 36 Am. St. Rep. 249, approving the principle and applying it to a statute fixing the rate of interest to be charged by bankers; *Union etc. Co. v. Dottenheim*, 107 Ga. 625, applying rule to statute as to interest chargeable by building and loan companies; *Bott v. Pratt*, 33 Minn. 328, 53

Am. Rep. 51, applying the principle of uniformity of city ordinance giving an action to a person in one leaving a team unfastened or unguarded.

Contract is Unlawful and will not be enforced if a transaction forbidden by statute under penalty.

Cited in *Field v. Austin*, 131 Cal. 384, and *apportion consideration appearing in aggregate payments of the sale*; *Mill etc. Co. v. Hayes*, 77 Cal. 215, to the point that an unlawful contract will not be enforced; also in 51 Am. Dec. 343, 344, the same point as the principal case.

Illegal Contract is enforceable as to any part. p. 272.

Cited in *McVicker v. McKenzie*, 136 Cal. 61, under facts stated.

Penalty for an Act is a prohibition of the act.

Cited in *Johnson v. Simonton*, 43 Cal. 20, holding as to the "Swill-milk Ordinance" of San Francisco of 1863.

29 Cal. 273-278. REESE v. STEARNS.

Legal Tender.—A dollar in treasury notes is legal tender in coin and evidence is not admissible to the contrary. p. 276.

Cited in *Poett v. Stearns*, 31 Cal. 80, so held in 31 Cal. 254, questioning the constitutionality of the act holding that a debt incurred before its passage is payable in legal tender notes except otherwise specified. *Wells, Fargo & Co. v. Van Sickle*, 6 Nev. 48, principal case. Cited in 87 Am. Dec. 126, 127.

Specific Contract Act.—A contract to pay in legal currency cannot be enforced in any other. pp. 275-278.

Cited in *Howe v. Nickerson*, 14 Allen, 40, holding that to pay a certain number of dollars in gold, will be enforced; also in 87 Am. Dec. 126, 127, extended.

Same.—Alternative judgment payable in gold or in legal tender notes is not authorized, p. 277.

Cited in *Carpentier v. Small*, 35 Cal. 357, holding that the value of gold currency for use and occupation may be rendered for the currency value.

29 Cal. 278-290. **MEYER v. KOHN**. S. C. 33 Cal. 484, 486, considering the modification of the judgment.

General Citation.—In 87 Am. Dec. 126, as an authority recognizing the constitutionality of the specific contract law.

29 Cal. 281-282. **STODDARD v. TREADWELL**. S. C. 26 Cal. 294.

Costs.—Upon reversal of judgment for plaintiff by appellate court and award of new trial and recovery of judgment thereon by plaintiff costs of the first trial may be included, p. 281.

Cited in *Shreve v. Cheesman*, 69 Fed. Rep. 789, in affirmance; *Schmidt v. Klotz*, 130 Cal. 224, holding costs a matter of right in action to quiet title; *Senior v. Anderson*, 130 Cal. 299, allowing costs of prior trial as in main case.

On Appeal, points not made in court below will not be considered, p. 282.

Cited in *Anderson v. Black*, 70 Cal. 231; *Watrous v. Cunningham*, 71 Cal. 32; and *Fisk v. Cuthbert*, 2 Mont. 599, all in affirmance; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 309, federal question first raised in petition for rehearing in highest state court is too late to confer jurisdiction on supreme court where such petition was denied without opinion.

29 Cal. 283-292. **DAVIS v. LIVINGSTON**.

Mechanics' Lien Law must be strictly complied with or lien has no status, p. 286.

Cited in *The Eclipse Mfg. Co. v. Nichols*, 1 Utah, 257; *Shackelford v. Beck*, 80 Va. 578; and *Liberty etc. Co. v. Furbush etc. Co.* 80 Fed. Rep. 637, all in affirmance.

Same.—Notice of lien for materials need not state of what they consisted, nor that they were used in the building nor give the name of both of two subcontractors, pp. 287, 288.

Cited in *McClain v. Hutton*, 131 Cal. 136, noted under *Brennan v. Swasey*, 16 Cal. 141; *Hicks v. Murray*, 43 Cal. 523, in dissenting opinion, but the case holds that the name of the owner or reputed owner should be stated; *Jewell v. McKay*, 82 Cal. 150, to the point that it is unnecessary to set out the items of account; and *Presbyterian Church v. Santy*, 52 Kan. 465, to the point that lien of subcontractors is not defeated by a mistake in incorrectly naming the original contractors where the name of the contractor, with whom they dealt and who was in charge of the work, is given. To ruling stated in 76 Am. Dec. 508, note.

Liens of Subcontractors, etc., are based upon and governed by original contract of which it is presumed such parties have had access and notice, p. 290.

Cited in *Shaver v. Murdock*, 36 Cal. 298, in

Same.—Such liens cannot be affected by appo
cocontractors with verbal assent of employer, j

Cited in *Hicks v. Murray*, 43 Cal. 522, in
only bearing generally upon the point of appo

29 Cal. 292-299. **DERRINGER v. PLATE.** 87

Trademark Act of 1863 is not exclusive o
pp. 296-298.

Cited in *Shaver v. Shaver*, 54 Iowa, 209, 3
same point; *Woodcock v. Guy*, 33 Wash. 239,
ment of trademark which fails to allege that i
cordance with Ballinger's Code, section 3621, n
table relief at common law.

Trademark has no separate abstract existe
to the goods designated, yet it is property, p. 51

Cited in *Vonderbank v. Schmidt*, 44 La. Ann.
St. Rep. 342, 344, to the same point. So also
88 Mich. 481; *Protective Union v. Conhaim*,
Am. St. Rep. 728; *State v. Bishop*, 128 Mo. 38;
574; 95 Am. Dec. 90, note; and 95 Am. Dec. 277.
a trademark is property; so also in note 100 A

Same.—Act of 1863 does not take away
registering trademarks under the act, pp. 297

Cited in *Whittier v. Dietz*, 66 Cal. 79, but
tion of the codes filing for record is necessary.

General Citation.—In *Brown Chemical Co. v.*
to the point that a trademark may be assigned
or successor in business.

29 Cal. 299-307. **SAUNDERS v. CLARK.**

Construction.—Written Contracts must be co
tent of parties, having in view the conditions
ties and such intent must prevail over the lit

Cited in *Piper v. True*, 36 Cal. 615, to the s
Sprague v. Edwards, 48 Cal. 249, and in *Ande*
196; *Burke Land etc. Co. v. Wells etc. Co.*,
mortgage given to secure purchase price of pro

29 Cal. 307-309. **CARIAGA v. DRYDEN.** S. C

Mandamus.—Judgment, however erroneous,
diction will not be disturbed by writ of mandari

Cited in *Lewis v. Barclay*, 35 Cal. 214, in affirmance. 30, also, in *Beguhl v. Swan*, 39 Cal. 411; and *Ketchum v. Superior Court*, 65 Cal. 495.

29 Cal. 309-312. HAGAR v. LUCAS.

Collateral Attack.—Patent not void upon its face is conclusive and not subject to collateral attack by one claiming no higher title, p. 311.

Cited in *Durfee v. Plaisted*, 38 Cal. 83, but holding that a patent void upon its face may be attacked collaterally; 85 Am. Dec. 93, note, as to impeachment of patent for public lands.

29 Cal. 312-317. O'CONNOR v. BLAKE.

Defense of Prior Lis Pendens is available only where plaintiff at least in both actions is the same person, p. 314.

Cited in *Ayres v. Bensley*, 32 Cal. 630, in affirmance.

Second Attachment of property in possession may be levied by return of interest in such property, p. 315.

Cited in 70 Am. Dec. 779, note, to this point.

Judgment for defendant dissolves attachment, p. 316.

Cited in *Rauft v. Young*, 21 Nev. 403, in affirmance; *Aigeltinger v. Whelan*, 133 Cal. 113, further holding judgment admissible to show such release; 39 Am. Dec. 609, extended note.

Judgment may not be Vacated and case reinstated by justice of the peace where suit has been dismissed on ground of nonappearance of the plaintiff, p. 316.

Cited in *Winter v. Fitzpatrick*, 35 Cal. 273, to the point that a justice may not review his own judgment except on motion for new trial; and *Dollins etc. v. Pollock & Co.*, 89 Ala. 360, to the same point as the principal case.

Replevin.—Judgment for costs should be given defendant if entitled to possession at commencement of action, but when his right ceases pending action, he is not entitled to judgment for return of property, pp. 316, 317.

Cited in *Flinn v. Ferry*, 127 Cal. 653, holding evidence as to plaintiff's right to possession pending the action improperly rejected; *Bolander v. Gentry*, 36 Cal. 110, S. C. 95 Am. Dec. 164, in affirmance of the point as to judgment when right ceases pending action; and *Pico v. Pico*, 56 Cal. 458, in affirmance, but explained as not depending upon allegations of the answer, but upon equitable principles.

29 Cal. 317-325. ROBINSON v. FORREST.

State Patent to lands can only be questioned by one between whom and the United States there is a privity of title, p. 320.

Cited in *Mahoney v. Van Winkle*, 33 Cal. 458, to the same effect; *Rosecrans v. Douglass*, 52 Cal. 216, holding that a preemptor has such privity; *Mery v. Brodt*, 121 Cal. 336, 337, but holding government patent obtained fraudulently attackable by occupant with right to obtain patent; 85 Am. Dec. 93, note to the ruling stated.

Swamp Lands.—When greater part of smallest legal subdivision is swamp the whole is swamp, p. 323.

Cited in *Fredericks v. Zumwalt*, 134 Cal. 46, holding land not swamp and overflowed. *Hogaboom v. Ehrhardt*, 58 Cal. 233, holding that an offer to prove that twenty acres of land is swamp must contain an offer to prove a greater part of a legal subdivision is swamp.

Same.—Doctrine that the state is owner of all swamps and overflowed lands undisposed of within its limits, modified, pp. 322, 323.

Cited in *Sherman v. Buick*, 45 Cal. 668, as qualifying the doctrine, but held not material to the question there; commented on in *Gaston v. Stott*, 5 Oreg. 58, 59, but the court withheld its opinion as to the correctness of the reasoning adopting such modification.

Same—Evidence.—Descriptive notes on plat of survey are not competent evidence of character of land until adopted between United States and state, pp. 322, 325.

Cited in *Keeran v. Griffith*, 31 Cal. 464, in affirmance.

Same.—Survey is not complete of townships until they are subdivided into sections and quarter sections by an approved United States survey. The lines are not ascertained, but created by such survey, p. 325.

Cited in *Chapman v. Polack*, 70 Cal. 496; *Hughes v. Wheeler*, 76 Cal. 233; *Bullock v. Ruse*, 81 Cal. 594; *Buchanan v. Nagle*, 88 Cal. 593, all in affirmance; *Rea v. Haffenden*, 116 Cal. 602, in affirmance as applied to a Mexican grant; *State v. Central P. R. R. Co.*, 21 Nev. 101, and *Central P. R. R. Co. v. Nevada*, 162 U. S. 525, both to the point that until lands are surveyed they cannot be identified for taxation. Distinguished in *Reclamation Dist. v. McCullah*, 124 Cal. 178, holding rule inapplicable to description in assessment under sections 3460, 3461, Political Code.

29 Cal. 326-329. **BRUNN v. MURPHY.**

Evidence.—**Tax Deed** with proper recitals is prima facie evidence of title, p. 327.

Cited in 4 Am. St. Rep. 188, extended note, to this point.

Taxation.—Assessment against persons named and against all owners, known or unknown, and claimants of any interest or liens, is good, p. 328.

Cited in extended note 85 Am. Dec. 100, as commenting upon *Moss v. Shear*, 25 Cal. 38; S. C. 85 Am. Dec. 94, in this connection.

Tax Deed.—Description may be applied by extrinsic evidence to land sold, p. 329.

Cited in *Wetherbee v. Dunn*, 32 Cal. 107, to the same effect.

General Citation.—In 17 Am. Dec. 512, extended note, as to recitals of legal conclusions in tax deeds.

29 Cal. 330-336. CARPENTIER v. MITCHELL.

Tenant in Common who has recovered in ejectment may maintain action for mesne profits against cotenant, p. 333.

Cited in 29 Am. Dec. 485, extended note, to this point.

Setoff.—Improvements made on land by trespasser cannot be set off against damages in action against him for possession by tenant in common who was owner prior to trespass, pp. 334, 335.

Cited in *Carpentier v. Gardiner*, 29 Cal. 162, in affirmance; 1 Am. Dec. 116, note; and 15 Am. Dec. 351, extended note on subject.

Statute of Limitations.—Rents and Profits in ejectment can only be recoverable for three years prior to commencement of action if statute is pleaded, pp. 335-336.

Cited in *Love v. Shartzer*, 31 Cal. 496, also so holding; and *Toombs v. Hornbuckle*, 3 Mont. 196, with approval.

General Citation.—*Paul v. Crognaz*, 25 Nev. 321.

29 Cal. 337-356. MORRISON v. BOWMAN.

Will—Estoppel.—Wife electing to take under a will clearly disposing of community property is estopped to claim title so as to defeat will, pp. 347-352.

Cited, affirming the principle, in *Noe v. Splivalo*, 54 Cal. 209; *Aldrich v. Willis*, 55 Cal. 87; *In re Stewart*, 74 Cal. 104; *In re Gilmore*, 81 Cal. 243; *In re Redfield*, 116 Cal. 643; *Branson v. Watkins*, 96 Ga. 58; *Langley v. Mathew*, 107 Ind. 202, 205; *Hurley Admr. v. McIver*, 119 Ind. 55; *Shipman v. Keyes Admr.*, 127 Ind. 356; but this last case qualifies the rule; *Jacobs v. Miller*, 50 Mich. 127; *Washburn v. Van Steenwyk*, 32 Minn. 351; and *Pratt v. Douglass*, 38 N. J. Eq. 536, 541. Cited in *Estate of Lufkin*, 131 Cal. 293, holding widow's claim for family allowance waived by election; *Whisnand v. Fee*, 21 Ind. App. 273, holding acceptance of bequest not an election to bar statutory allowance; *McDonald v. Moak*, 24 Ind. App. 531, quoting *Hurley v. McIver*, 119 Ind. 55; *Mayo v. Tudor's Heirs*, 74 Tex. 473, to the point that the wife's election in such case is necessary and that it must appear that she accepted some benefit inconsistent therewith. Cited also in 26 Am. Dec. 503, 505, note; 43 Am. Dec. 757, note; and 63 Am. Dec. 128, note.

Construction of Will.—Intention of testator controls, p. 350.

Cited in *In re Stewart*, 74 Cal. 101, with Dec. 503, note.

Same.—It is not to be presumed in the case on the part of the testator that he designates not his own, p. 350.

Cited in *In re Gilmore*, 81 Cal. 242, to the 108 Cal. 119, with approval. So, also, in *Ma* 34 Minn. 164; S. C. 57 Am. Rep. 45; and 26

Deed by Attorney in fact must be signed p. 352.

Cited in *Southern P. Co. v. Von Schmidt* held inapplicable as the principal case was decided when the doctrine of *ademption* was abolished as to contracts under sea-tended note.

Judgment Should Correspond with the relief not extend benefits beyond that, p. 354.

Cited in *Nevada etc. Co. v. Kidd*, 37 Cal. 38 from the principal case.

29 Cal. 359-385. **MYERS v. MOTT.** 89 Am.

Appeal from judgment raises all material points, p. 362.

Cited in *Hurtgen v. Kantrowitz*, 15 Colo.

Judgment Enforcing Attachment Lien by application of proceeds to satisfaction of demand action continued against administrator, pp.

Cited in *Bank of Stockton v. Howland*, at that point in connection with the question as to joint and several liability against the surviving obligors and the deceased obligor; and in *Holladay v. Hare*, 69 holding.

Attachment Lien is Dissolved by death of debtor before judgment, pp. 367-370.

Cited in *Hensley v. Morgan*, 47 Cal. 623, in *Ham v. Cunningham*, 50 Cal. 366; *Day v. St.* *Holladay v. Hare*, 69 Cal. 517, in connection with the charge of bankruptcy and liability of proper parties; *Tucker*, 7 Colo. 39, with approval; in *Bern* 418, as so deciding, but in that case it was held that under the recent Debtor Act such lien was preserved; 70 Am. Dec. 611, extended note; 70 Am. Dec. 7142, extended note; and 8 Am. St. Rep. 289,

Same.—In such case the attached property passes into the administrator's hands for administration, p. 370.

Cited in *Day v. Superior Court*, 61 Cal. 494, to the same point.

29 Cal. 385-392. DOE v. VALLEJO.

Verdict will not be set aside as contrary to evidence where there is a substantial conflict of evidence, pp. 390, 392.

Cited in *Appeal of Piper*, 32 Cal. 537, in affirmance; so, also, in *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 37; and in *Silva v. Pickard*, 14 Utah, 254.

Same.—Such rule applies in law or equity, p. 391.

Cited in *Silva v. Pickard*, 14 Utah, 254, in affirmance.

Interest upon Interest due cannot be allowed without express agreement, p. 392.

Cited in *Finger v. McCaughey*, 114 Cal. 66, but only generally in connection with compounding interest under agreement; *Yndart v. Den*, 116 Cal. 545, 546, S. C. 58 Am. St. Rep. 208, 209, in affirmance; and 35 Am. Dec. 141, note.

29 Cal. 393-395. BLOOD v. SHANNON.

Broker is entitled to commission where he has performed the service by effecting a sale at the price specified, p. 395.

Cited in *Wilson v. Sturgis*, 71 Cal. 229; and *Smith v. Schiele*, 93 Cal. 149, both in affirmance; *Watson v. Brooks*, 13 Fed. Rep. 543; S. C. 8 Sawy. 320, as to when a sale by a broker for commissions is performed but declared not exactly in point.

29 Cal. 395-407. EX PARTE McCARTHY.

Senate has Power to investigate alleged criminal conduct of members with a view to expulsion or punishment if guilty, p. 406.

Cited in *Ex parte Lawrence*, 116 Cal. 299; and *In re Lawrence*, 80 Fed. Rep. 101, 102, both in affirmance.

Contempt.—Senate has power to commit witness for contempt for refusing to testify before it, pp. 406, 407.

Cited in *In re Lawrence*, 80 Fed. Rep. 101, 102, and *In re Davis*, 58 Kan. 379, to the same point in affirmance. See, also, *Ex parte Lawrence*, 116 Cal. 299.

General Citation.—In 85 Am. Dec. 491, note in connection with the general question of perjury before officers or tribunals.

29 Cal. 407-414. WINTER v. STOCK. 80 Am. Dec. 57.

Deed to L. B. and Co. vests title in L. B. alone, pp. 410-412.

Cited in *Woodward v. McAdam*, 101 Cal. 441, as so deciding, but in

that case mortgage to a partnership under the 1
mitted to be foreclosed against the grantee of the
assignee of the firm; *Lindley v. Davis*, 7 Mont. 218
ion, in affirmance, but the question there concer
from partnership assets of real estate standing i
partners; *Barnet v. Lachman*, 12 Nev. 367, in affir
197, note; 12 Am. St. Rep. 742, note; 19 Am. St.
48 Am. St. Rep. 65, extended note. Distinguished
v. Fruit Clg. Co., 101 Fed. 828, holding assignment
artificial name to vest the property in the partne

Warranty of Title as "indisputable and satisf
with if title is good and valid, notwithstanding
of title, pp. 409, 412.

Cited in *Montgomery v. Pacific Coast L. Bureau*
28 Am. St. Rep. 127, in affirmance; *Allen v. Pock*
C. 42 Am. St. Rep. 101, but briefly noted and de
as in that case the contract provided for the accept
title by the purchaser's attorney.

29 Cal. 414-415. **PEOPLE v. RICHMOND.**

Criminal Act is not justified by the fact that
control of master, principal, parent, or superior, p.

Cited in *Cagle v. State*, 87 Ala. 39, in affirmance
illegal sale of liquor by a minor under parent's i
70 Am. Dec. 499, note.

29 Cal. 415-418. **PEOPLE v. ROSBOROUGH.**

Election Contest.—Remedy for defeated party
motion for new trial. The jurisdiction in such c
416, 417, as having been so decided in *Dorsey v. B*

Cited in *Packard v. Craig*, 114 Cal. 97, in affir
the principal case.

Mandamus Lies to compel county judge to settle
tion for new trial, p. 417.

Cited in *Wood v. Strother*, 76 Cal. 550, S. C. 9 A
discussion as to the office of the writ and holding
pel an auditor to countersign a warrant for street
in *Keane v. Murphy*, 19 Nev. 95, with approval.

General Citation.—In 70 Am. Dec. 724, note, as
the appellate court under article 6, section 4, of the

29 Cal. 421-422. **PEOPLE v. ROBLES.**

Witness may be Asked on cross-examination as
counts of the matter on prior occasions, p. 421.

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Cited in *People v. Ebanks*, 117 Cal. 665, but only generally as to the cross-examination there being within the rules.

29 Cal. 422-427. **BAILEY v. TAAFFE.**

Setting Aside Default.—Affidavit is insufficient which does not show either a meritorious defense or that the default occurred through mistake, inadvertence, surprise, or excusable neglect, p. 423.

Cited in *Parrott v. Den*, 34 Cal. 80, to the point that an affidavit of merits is indispensable. So, also, in *Nevada Bank v. Dresbach*, 63 Cal. 325; approved in *Mayer v. Mayer*, 27 Oreg. 136, as to meritorious defense; *Gauthier v. Rusicka*, 3 N. Dak. 3, holding that an affidavit of merits, the answer not being verified, is necessary to vacate judgment. Cited in 58 Am. Dec. 398, as to what constitutes mistake, inadvertence, surprise, and excusable neglect.

Granting or Refusing Order Setting Aside Default is in sound discretion of court subject only to review for abuse, but the discretion intended is not arbitrary but legal, pp. 423, 424.

Cited in *Melde v. Reynolds*, 129 Cal. 311, noted under *Roland v. Kreyenhagen*, 18 Cal. 455; *Ferris v. Wood*, 144 Cal. 428, applying rule to motion to dismiss action for want of prosecution; *Potter v. Holmes*, 74 Minn. 512, and *Utah etc. Bank v. Trumbo*, 17 Utah, 208, holding vacation of default improperly refused; *Coleman v. Rankin*, 37 Cal. 249, to the point that the order rests in the discretion of the court subject only to review for abuse; *Barnes v. Barnes*, 95 Cal. 183, in affirmance; *Williamson v. Cummings etc.* 95 Cal. 653, with approval as to the matter resting in the court's discretion, subject only to review for abuse; *Miller v. Carr*, 116 Cal. 381, S. C. 58 Am. St. Rep. 182, in affirmance quoting from the principal case; *Byers v. McPhee*, 4 Colo. 207, with approval as to the character of the discretion; *Tidwell v. Wetherspoon*, 18 Fla. 289, to the same point with the qualification that the discretion is always open to review; *Jensen v. Barbour*, 12 Mont. 576, in approval quoting from the principal case; *Harper v. Mallory*, 4 Nev. 453, in dissenting opinion, but the refusal of the court below to open the default was sustained; *Horton v. New Pass Co.*, 21 Nev. 187, in affirmance quoting from the principal case; *White v. Northwest Stage Co.*, 5 Oreg. 103, to the point that the court will not interfere in such case except for abuse of discretion; *Savage v. Savage*, 10 Oreg. 336, quoting from the principal case with approval as to the character of the discretion; so, *Thompson v. Connell*, 31 Oreg. 235; and *Evans v. Fall River County*, 4 S. Dak. 123, holding to the same effect as the principal case. So, also, in *Walker Bros. v. Insurance Co.*, 2 Utah, 333; *Enright v. Grant*, 5 Utah, 344; and *Hull v. Vining*, 17 Wash. St. 359, in affirmance, quoting from the principal case as to the character of the discretion. Also cited in 58 Am. Dec. 393, extended note.

Same.—Affidavit should be made by defendant unless good cause appear and not by his counsel, pp. 425, 426.

Cited in *Nicholl v. Nicholl*, 86 Cal. 37, where the affidavit by the attorney was upheld as it showed sufficient reason for its not being made by the party himself; also in 58 Am. Dec. 396, extended note.

Same.—Facts constituting defense need not be stated, p. 426.

Cited in *Francis v. Cox*, 33 Cal. 325, in affirmance; contra, *Donnelly v. Clark*, 6 Mont. 138; and *Nickerson v. California R. Co.*, 61 Cal. 268. Also cited in 58 Am. Dec. 396, extended note.

Same.—Answer ought as the better practice to be exhibited to the court on motion to set aside default, p. 426.

Cited in *Parrott v. Den*, 34 Cal. 81, where the default was rendered on an amended complaint, and it was held that the answer to the original complaint could not be treated as an affidavit of merit; so, in *Gauthier v. Rusicka*, 3 N. Dak. 3, holding that where the answer was not verified an affidavit of merits was necessary to vacate judgment.

Same.—Counter-Affidavits were considered in connection with affidavit of defendant on the motion to set aside default, pp. 426, 427.

Cited in *Francis v. Fox*, 33 Cal. 326, holding that where merits are shown by affidavits counter-affidavits cannot be received; also explaining the principal case.

Opening Default.—Costs should be imposed as a condition therefor, p. 427.

Cited in *Heerman v. Sawyer*, 48 Cal. 563, so holding.

General Citation.—In 58 Am. Dec. 394, note, to the point that an order vacating a judgment by default is appealable.

29 Cal. 427-429. **PEOPLE v. MOORE.**

Nuisances—Jurisdiction.—County courts have original jurisdiction to abate nuisances, p. 429.

Cited in *Courtwright v. Bear R. W. & M. Co.*, 30 Cal. 577, in affirmance, holding also that district courts have such jurisdiction.

Action to Abate Nuisance is "a case in equity," p. 429.

Cited in *Sullivan v. Royer*, 72 Cal. 249; *S. C. 1 Am. St. Rep. 52*, with approval; and followed in *Akin v. Davis*, 11 Kan. 587.

29 Cal. 429-436. **PEOPLE v. EVANS.**

Official Bond.—Sureties are liable thereon notwithstanding defects in approval or approval by wrong officer, p. 436.

Cited in *People v. Kneeland*, 31 Cal. 293, with approval. So, also, in *Mendocino Co. v. Morris*, 32 Cal. 148; following in *People v. Huson*,

78 Cal. 157. Cited in *Board of Co. Commrs. v. State Bank*, 64 Minn. 184, to the point that such sureties cannot escape liability on the ground that the principal was not duly elected, appointed, nor legally qualified; and in *State etc. v. Proudfoot*, 38 W. Va. 743, to the same effect as the principal case.

Action on Official Bond—Joinder.—Any number of persons severally liable on bond may be joined without joining all, p. 436, in connection with argument of counsel, p. 430.

Cited in *Heppe v. Johnson*, 73 Cal. 270, in affirmance.

Official Bond.—Judgment may be entered against each surety for amount of his liability and for all costs with provision that only amount of judgment be collected in gross, p. 436.

Followed in *Heppe v. Johnson*, 73 Cal. 270.

29 Cal. 437-444. **HASKELL v. MOORE.**

Counterclaim.—Partnership demands between plaintiff and defendant cannot be set off in suit on a contract of indemnity, pp. 443, 444.

Cited in *Lane v. Turner*, 114 Cal. 399, in affirmance.

29 Cal. 444-449. **MASTICK v. THORP.**

Judgment.—Equity will not set aside judgment or grant new trial except all remedy at law has been lost without fault or negligence or there has been fraud, accident, mistake, or surprise, pp. 447-449.

Cited in *Boston v. Haynes*, 33 Cal. 36, 38, so holding; *Davis v. Chalfant*, 81 Cal. 631, as authority in connection with the sufficiency of a bill in equity to set aside judgment and obtain a new trial; and *Dunlap v. Steere*, 92 Cal. 355, S. C. 27 Am. St. Rep. 148, in affirmance of the principle as applied to grounds for equitable relief in equity against an unconscionable advantage gained; *McMillan v. Wooley*, 6 Idaho, 43 holding insufficient a complaint in action to procure new trial of former action; 19 Am. Dec. 606, 607, extended note, fully considering the various phases of this subject; and 53 Am. St. Rep. 447, extended note, as to negligence as a bar to equitable relief and "negligence in not attending trial."

General Citation.—In *Latham v. Blake*, 77 Cal. 648, citing the principal case at page 448, in dissenting opinion, but so far as we are able to determine the citation is not in point, although the general trend of the dissenting opinion might indicate that the question of impeachment of judgments and orders was involved in the citation.

29 Cal. 449-453. **PEOPLE v. HASTINGS.**

Taxation.—Assessment must be made as provided by law or tax is not valid, p. 451.

Cited, in *People v. San Francisco Sav. Union*, 31 Cal. 138, 140, with

approval. So, also, in *People v. McCreery*, 34 Cal. 437; *People v. Sargent*, 44 Cal. 434, quoting to this point with approval; so, in *Savings & Loan Soc. v. Austin*, 46 Cal. 512; and *Nebraska City v. Gas Co.*, 9 Neb. 345, to the same effect; *State v. F. J. S. M. Co.*, 14 Nev. 247, in affirmance; *In re Page*, 60 Kan. 848, holding taxation act unconstitutional under local statutes. *Clegg v. State*, 42 Tex. 610, holding that assessment must be made as provided by law to give right of action.

Taxation.—Assessment must be made by duly elected assessor and by assessor of district where tax is levied, pp. 451-452.

Cited in *People v. S. F. Sav. Union*, 31 Cal. 138, with approval as to assessment by duly elected assessor; so in *People v. McCreery*, 34 Cal. 437; *People v. Kelsey*, 34 Cal. 476, and *People v. Hastings*, 34 Cal. 576. Cited in *People v. P. & S. V. R. R. Co.*, 34 Cal. 657, with approval. So, in *Reily v. Lancaster*, 39 Cal. 358, 359; *People v. Sargent*, 44 Cal. 434; and *Savings and Loan Soc. v. Austin*, 46 Cal. 512, quoting at length from the principal case. Affirmed in *Williams v. Corcoran*, 46 Cal. 556, as to the assessment made by assessor of district; and so, in *People v. White*, 47 Cal. 617. Cited in *Houghton v. Austin*, 47 Cal. 663, 664, in affirmance; *Mason v. Johnson*, 51 Cal. 614, holding that a tax collector of a city cannot collect taxes of an adjoining town, even though annexed to the city after his election; *Smith v. Farrelly*, 52 Cal. 80, to the same effect as the last citation; *Farmers' etc. Bank v. Board*, 97 Cal. 324, but holding that the principal case has no application to the new constitution; *City v. Kaunitz*, 39 Fla. 698, 63 Am. St. Rep. 207; noted under *Ferris v. Coover*, 10 Cal. 589; *Slaughter v. Louisville*, 89 Ky. 124, to the point that the valuation must be made by an assessor; and so in *State v. Tonella*, 70 Miss. 711, also holding that the legislature cannot substitute another officer as against a constitutional designation of the officer.

Same.—Legislature cannot make the valuation, p. 452.

Cited in *People v. San Francisco Sav. Union*, 31 Cal. 138, in affirmance; So in *People v. McCreery*, 34 Cal. 437; and *Slaughter v. Louisville*, 89 Ky. 124. Cited in *State v. Tonella*, 70 Miss. 711, to the point that the legislature cannot substitute another than the one authorized by the constitution to make assessment.

General Citation.—*Christy v. B. S. Sacramento Co.*, 39 Cal. 11, to the point that when the constitution declares an office elective it can be filled in no other mode than that provided by the instrument itself. *Lyman v. Howe*, 64 Ark. 437.

29 Cal. 453-459. FINCH v. TEHAMA COUNTY.

Board of Supervisors is a body of limited jurisdiction, and its jurisdiction must appear in the record of its proceedings, p. 455.

Cited in *State v. Washoe Co.*, 5 Nev. 319, in affirmance; *County of Colusa v. County of Glenn*, 124 Cal. 501, applying rule to state board

is applied to county commissioners; so in *State v. Central Pac. R. R. Co.*, 9 Nev. 89; *Johnson v. Eureka Co.*, 12 Nev. 31; and in *Godchaux v. Carpenter*, 19 Nev. 418.

29 Cal. 459-460. **PEOPLE v. BURNEY.**

Certiorari.—Mere errors of law of an inferior court cannot be reviewed on certiorari, p. 460.

Cited in *Morley v. Elkins*, 37 Cal. 457, to the point that certiorari does not lie for error within the jurisdiction of the county court. So in *Central P. R. R. Co. v. Placer Co.*, 46 Cal. 670, to the same effect; *State ex rel. v. Skinner*, 33 La. Ann. 257, in affirmance; *Kirby v. Circuit Court*, 10 S. Dak. 41, denying right to writ.

Appellate Power of supreme court does not extend to cases of misdemeanor, p. 460.

Cited in *People v. Johnson*, 30 Cal. 101, in affirmance.

29 Cal. 460-466. **BONDS v. HICKMAN.** S. C. 32 Cal. 202, 204, considering the points of a patent to administrator and also of such patent as evidence.

Filing Notice of appeal is indispensable to perfect appeal; a waiver of the filing is not its equivalent, for consent, though it may waive error, cannot confer jurisdiction, pp. 462, 463.

Cited in *Moyle v. Landers*, 78 Cal. 106, S. C. 12 Am. St. Rep. 28, with approval, but declared not in point, service of notice being made in that case upon attorney after his client's death, and he was employed by deceased's representatives; *Matter etc. of Gold St. v. Newton*, 2 Dak. Ter. 40, in substantial affirmance; and followed in *Oliver v. Harvey*, 5 Oreg. 362. Cited in *Wolf v. Smith*, 6 Oreg. 74, to the same points, citing also the last citation herein; *Seattle etc. Co. v. Simpson*, 19 Wash. 633, 634, notice and holding defect not waived by appearance; *Chamberlain v. Hedger*, 10 S. Dak. 293, as to waiver by stipulation as to appeal prematurely taken; *Yori v. Cohn*, 26 Nev. 228, where parties fail to agree as to statement of case on motion for new trial, and statement is settled by court, certificate of judge that statement has been allowed and is correct cannot be impeached on appeal by extrinsic evidence.

Appeal.—Supreme court can only act upon the transcript of the record which may be perfected by inserting or striking out, but the document itself cannot be varied or amended by appellate court, pp. 463, 464.

Cited in *Satterlee v. Bliss*, 36 Cal. 521, as well settled; so in *Thompson v. Patterson*, 54 Cal. 547; affirmed in *Boyd v. Burrell*, 60 Cal. 284. Cited in *State v. C. P. R. R. Co.*, 21 Nev. 101, with approval; *Mouser v.*

Palmer, 2 S. Dak. 470, to the same effect; Washoe etc. Co. v. Hickey, 23 Mont. 322, but sustaining right of appellate court to examine original appeal bond notwithstanding clerk's certificate as to its correctness; Bogges v. Harris, 90 Tex. 477, to the point that the trial court and not the appellate court retains jurisdiction over the record and it is for the former to change it or determine its correctness; and in Ward v. Springfield etc. Ins. Co., 12 Wash. St. 633, as settled doctrine.

Appeal.—Stipulation that notice was filed and served will not be disregarded or set aside by appellate court for mistake, pp. 464, 465.

Cited in Carey v. Brown, 58 Cal. 186, in affirmance; Moyle v. Landers, 78 Cal. 106, S. C. 12 Am. St. Rep. 28, but on the last point herein, although it is doubted whether an express stipulation naming the necessary steps would not be binding; Wadsworth v. Wadsworth, 81 Cal. 183, where the stipulation was held sufficient, although it does not appear what the exact facts were; and in Forin v. Yoell, 99 Cal. 174, where the stipulation as to the undertaking was upheld, referring also to section 940 of the Code of Civil Procedure.

Same.—Trial court upon proper application could relieve from such stipulation on the ground of mistake, p. 464.

Cited in Rapp v. Spring Valley G. Co., 74 Cal. 535, in affirmance.

Patent of United States cannot be attacked collaterally because issued to administrator of deceased assignee of a military land warrant, p. 465.

Cited in Truckee etc. R. Co. v. Campbell, 44 Cal. 92, holding that a franchise cannot be attacked collaterally for mere error in the exercise of authority to make the grant; Sherman v. McCarthy, 57 Cal. 512, quoting from the principal case to the same point; and so in Christy v. Fisher, 58 Cal. 257; California Reduction Co. v. Sanitary Reduction Works, 126 Fed. 42, validity of grant of franchise by city not collaterally attacked by private party on ground of irregularity in exercise of power by city, nor because of failure of grantee to perform conditions, nonperformance of which work forfeiture.

29 Cal. 466-479. **WOODS v. BUGBEY.**

Sales and mortgages of personal property are void as to creditors without immediate, actual, and continued change of possession, and what amounts to such change depends upon the circumstances of each case, pp. 471-474.

Cited in Hilliker v. Kuhn, 71 Cal. 221, applying the rule to a pledge; Brown v. O'Neal, 95 Cal. 267, S. C. 29 Am. St. Rep. 114, in affirmance in connection with the sale to a third person by a cotenant in exclusive possession; Dubois v. Spinks, 114 Cal. 204, in affirmance; George v. Pierce, 123 Cal. 177, noted under Stevens v. Irwin, 15 Cal. 503; Ruggles v. Cannedy, 127 Cal. 295, noted under Chenery v. Palmer, 6 Cal.

119; *Ray v. Raymond*, 8 Colo. 470, applying the rule to an assignment; *Bassinger v. Spangler*, 9 Colo. 186, 187, 188, in affirmance; *Allen v. Steiger*, 17 Colo. 557, holding that a mortgagee must assume possession within a reasonable time; *Autrey v. Bowen*, 7 Colo. App. 411, with approval; *Dodge v. Jones*, 7 Mont. 141, in dissenting opinion, but the case holds that executing and delivering a bill of sale of horses bought in good faith, paid for, branded and turned loose with other horses was a sufficient delivery; *Tognini v. Kyle*, 17 Nev. 213, S. C. 45 Am. Rep. 443, holding that the change of possession was sufficient of charcoal in pits, where the vendee's agent marked the pits with their name, remained in possession a few days, and then left in charge of another who visited the pits every day; *Howard v. Dwight*, 8 S. Dak. 402, in affirmance; *Ewing v. Merkley*, 3 Utah, 411, holding that delivery to a mortgagee should be in a reasonable time; *Shaner v. Alterton*, 151 U. S. 624, in affirmance. So, in *Edmonson v. Hyde*, 2 Sawy. 208, 209; S. C. 7 Bank. Reg. 4, in the case of a mortgage; and in *In re Morrill*, 2 Sawy. 359; S. C. 7 Bank. Reg. 120; also a case of a mortgage. Cited in 76 Am. Dec. 504, note; and 85 Am. Dec. 187, note.

General Citation.—*Walters v. Ratliff*, 10 Okla. 274.

29 Cal. 480-485. **PEOPLE v. SASSOVICH.**

Constitutional Law.—Statute must be held valid unless clearly repugnant to the constitution, p. 482.

Cited in *Ex parte Rodriguez*, 39 Tex. 770, in affirmance; so in *Southern P. R. R. Co. v. Orton*, 32 Fed. Rep. 473, S. C. 6 Sawy. 186, to substantially the same effect; *Tucker v. Barnum*, 144 Cal. 271 (dissenting opinion), construing County Government Act, p. 365.

Person is de facto Official who enters under color of right and title to office, p. 485.

Cited in *Hull v. Superior Court*, 63 Cal. 177, to the same point; *Park's Petition for Habeas Corpus*, 3 Mont. 430, with approval; and in 19 Am. Dec. 68, extended note.

Title to an Office cannot be questioned collaterally, p. 486.

Cited in *People v. Provines*, 34 Cal. 523, and *People v. Mellon*, 40 Cal. 656, in affirmance; so in *Hull v. Superior Court*, 63 Cal. 177; and in *Park's Petition for Habeas Corpus*, 3 Mont. 432, cited in *Walcott v. Wells*, 21 Nev. 55; S. C. 37 Am. St. Rep. 484, to the same effect; *Hamlin v. Kassafer*, 15 Oreg. 460; S. C. 3 Am. St. Rep. 180, in affirmance; *Susanville v. Long*, 144 Cal. 365, as to ordinance passed by trustees alleged to have been merely de facto; 19 Am. Dec. 68, extended note.

29 Cal. 486-491. **FAIR v. STEVENOT.**

In Case of Separate Appeals each must be heard on its own transcript, p. 487.

Cited in *Gates v. Walker*, 35 Cal. 291, so holding.

Notice.—Possession which is open, notorious, and exclusive is sufficient evidence of notice of occupant's title to real estate to put subsequent purchaser on inquiry, pp. 488-491.

Cited in *Smith v. Yule*, 31 Cal. 184; S. C. 89 Am. Dec. 170, so holding; *Pell v. McElroy*, 36 Cal. 272, as a well-settled doctrine; in *Thompson v. Pioche*, 44 Cal. 516, in affirmance; *Pico v. Gallardo*, 52 Cal. 208, to the point that such possession is not notice but only evidence tending to prove notice; *Hellman v. Levy*, 55 Cal. 119, in affirmance; so in the following cases. *Palmtag v. Doutrick*, 59 Cal. 167; S. C. 43 Am. Rep. 255; *Unger v. Mooney*, 63 Cal. 596; S. C. 49 Am. Rep. 106; *Montgomery v. Keppel*, 75 Cal. 131; S. C. 7 Am. St. Rep. 126, also declaring the rule well settled; *Bank of Mendocino v. Baker*, 82 Cal. 117; and *Dreyfus v. Hirt*, 82 Cal. 625, as applied to an unrecorded lease; *Emeric v. Alvarado*, 90 Cal. 472, 473, also declaring that such possession is not ipso facto notice but only evidence tending to show notice; *Winterburn v. Chambers*, 91 Cal. 182, as applied to an entry and possession under an administrator's deed unrecorded; so in *De Frieze v. Quint*, 94 Cal. 663; S. C. 28 Am. St. Rep. 156; *Randall v. Lingwall*, 43 Or. 387, where decedent deeded land to brother, who reconveyed to decedent, and latter deed not recorded, but decedent took possession and leased land to third person, who paid rent to him, and after decedent's death brother claimed land and collected rent, possession of tenant was notice to purchaser of decedent's rights; *Gale v. Shillock*, 4 Dak. 196; *Jeffersonville etc. R. R. Co. v. Oyler*, 82 Ind. 406; and in *Rayburn v. Davisson*, 22 Oreg. 244; *Betts v. Letcher*, 1 S. Dak. 194; 13 Am. Dec. 250, note; 73 Am. Dec. 549, note; and 82 Am. Dec. 776, note. Distinguished in *Bell v. Pleasant*, 145 Cal. 414, in action to cancel deeds where plaintiff asserts title under prior unrecorded deed and defendants claim under recorded deeds resting on subsequent recorded deed from plaintiff's grantor under which grantor took no title as such, burden is on defendant to show bona fide purchase.

Findings.—In the absence of findings appellate court will not assume functions of lower court and make findings, p. 491.

Cited in *Carpentier v. Small*, 35 Cal. 359, to the same effect.

29 Cal. 492-503. **RICE v. CUNNINGHAM.**

New Trial.—Verdict will not be disturbed where there is a substantial conflict of evidence, pp. 495, 496.

Cited in *Appeal of Piper*, 32 Cal. 537, in affirmance; *Wilson v. Cross & Co.*, 33 Cal. 68, where the rule is stated, but held not to retain its full force when the testimony consists entirely of depositions and the court below had no opportunity to judge the witnesses; *Pralus v. Pacific etc. Co.*, 35 Cal. 37, in affirmance; so in *Welland v. Williams*, 21 Nev. 233; and *Ichi Irrigation Co. v. Moyle*, 4 Utah, 330.

the motion for a new trial did not preside at the trial, pp. 495, 496.

Cited in *Welland v. Williams*, 21 Nev. 233, in affirmance.

Evidence—Alcaldes' Grants.—Record book is not admissible without exhibition of marginal notes and cross-lines. Accompanying proof of circumstances is admissible, pp. 497-501.

Cited in *Donner v. Palmer*, 31 Cal. 514, 522, commenting on and explaining the principal case, but it was held that an alcalde's book was admissible though not strictly kept; *Palmer v. Low*, 98 U. S. 12, quoting from the principal case, p. 497.

Evidence of former statement of witness cannot be given in evidence except for impeachment, but witness must be previously examined as to such statements, p. 501.

Cited in *Rulofson v. Billings*, 140 Cal. 458, applying rule to declarations of decedent not against interest; 73 Am. Dec. 763, to this and analogous points, in an extended note discussing the subject

General Citation.—In *Cunningham v. Ashley*, 45 Cal. 491, 494, but merely historically, as preceding that action. This citation, including the principal case, is also quoted from in *Hearfield v. Bridges*, 75 Fed. Rep. 53.

29 Cal. 503-507. **BRUMMAGIN v. TALLANT.** 89 Am. Dec. 61.

Statute of Limitations begins to run from date of banker's certificate of deposit payable on demand and no demand is necessary, pp. 505, 506.

Cited in *O'Neil v. Magner*, 81 Cal. 633, 15 Am. St. Rep. 88, 89, applying the principle to a note payable on demand; *Jones v. Nicholl*, 82 Cal. 34 to the point that the statute begins to run when a right of action accrues; *Mereness v. First Nat. Bank*, 112 Iowa, 14, 84 Am. St. Rep. 320, holding action thereon barred under facts stated; *Tripp v. Curtenius*, 36 Mich. 499, S. C. 24 Am. Rep. 614, with approval; *Curran v. Witter*, 68 Wis. 20; S. C. 60 Am. Rep. 828, so holding; *Bartlett v. Rogers*, 3 Sawy. 65, with approval; 42 Am. Dec. 579, note; 99 Am. Dec. 781, note; and 15 Am. St. Rep. 89, note.

Certificate of deposit and promissory note are the same in legal effect, pp. 506, 507.

Cited in *Poorman v. Mills*, 35 Cal. 120; S. C. 95 Am. Dec. 91, so holding; *McCully v. Cooper*, 114 Cal. 262; S. C. 55 Am. St. Rep. 69, with approval; so in *Mitchell v. Easton*, 37 Minn. 338; *State v. Hill*, 47 Neb. 511; *Contra, Gutch v. Fosdick*, 48 N. J. Eq. 357; S. C. 27 Am. St. Rep. 477. Cited in *Curran v. Witter*, 68 Wis. 20; S. C. 60 Am. Rep. 828, so holding; 14 Am. Dec. 426, note; 42 Am. Dec. 577, note; 60 Am. Dec. 581, note; 95 Am. Dec. 93, note; and 4 Am. St. Rep. 534, note.

General Citation.—In 98 Am. Dec. 564, note, referring to note 89 Am.

Dec. 61, for general discussion as to mand.

29 Cal. 507-514. **JAHNS v. NOLTING.**

Administrator is entitled to possess estate as of relation to the date of intestacy.

Cited in Ham v. Henderson, 50 Cal. 135 Crouse, 135 Cal. 18, noted under Beck Dec. 257, note.

Administrator has action for wrong to personal estate of deceased, pp. 512-514.

Cited in Ham v. Henderson, 50 Cal. 135.

Embezzling Estate of Deceased.—See section 512, which affords exclusive remedy, pp. 512-514.

Cited in Levy v. Superior Court, 103 Cal. 1458, in connection with sections 1458-1461 of Probate Code.

Same.—Said section of the Probate Code provides for a statute, pp. 512-514.

Cited in Greenberg v. Bank, 5 N. D. 100.

29 Cal. 514-526. **GARWOOD v. GARWOOD.**

Identity of names is prima facie evidence of identity, pp. 520.

Cited in Stapleton v. Pease, 2 Mont. 100.

Doctrine of res adjudicata applies to judgments of probate court, p. 521.

Cited in Howell v. Budd, 91 Cal. 300, where it was held that with an adjudication of heirship; Estate of a decedent where in former suit laws of another state were attracted under belief of death of former decedent marriage void from beginning were not binding in final decree of distribution do not operate as a bar to a subsequent action against fact of widowhood.

Estoppel.—Judgment of court having res adjudicata effect and as evidence conclusive, but this rule may be in controversy, but rest in evidence, pp. 521.

Cited in Marshall v. Shafter, 32 Cal. 420, where it was held that an action to set aside a deed as a fraud does not preclude an action to set aside a deed as a fraud, but substantially affirming the rule, but holding that estoppel by judgment upon a certain issue does not apply, 56 Cal. 420, holding that as to certain

operated as an estoppel, but whether certain other parties were estopped the court did not decide; *Ferrea v. Chabot*, 63 Cal. 570, holding that a judgment can only be used as evidence in relation to matters directly determined by it and that the code provisions are merely declaratory of the common law; *Sanders v. Simcich*, 65 Cal. 54, holding that in a proceeding by the administrator of the "surviving wife" it was error to refuse evidence aliunde upon the question of survivorship, both husband and wife having perished in the same calamity; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 560, in affirmance; so in *Hall v. Susskind*, 109 Cal. 206; *Reed v. Cross*, 116 Cal. 484; and *Glenn v. Savage*, 14 Oreg. 574; *La Follett v. Mitchell*, 42 Or. 472, where in action by buyer against seller for failure to deliver, seller made affirmative defense that buyer refused to deliver when property tendered to his damage, judgment for defendant for costs is no bar to action by seller against buyer for damages for refusal to receive goods tendered; *Amory v. Amory*, 26 Wis. 162, in connection with the conclusiveness of a decree as to the status of parties; and in *Boyle v. Hinds*, 2 Sawy. 530, and applied to the point that a failure to appeal from the decree of land commissioners as to a Mexican grant makes the decision conclusive. Cited in 41 Am. Dec. 682, extended note, as to the rule applying only to matters directly in issue; 85 Am. Dec. 211, note, as to conclusiveness of judgments; and 96 Am. Dec. 776, 779, note, to the ruling stated.

29 Cal. 529-533. RICHARDSON v. SMITH.

Pleading.—Material allegation not sufficiently denied is admitted, pp. 531-532.

Cited in *Salmon v. Olds*, 9 Oreg. 489, in affirmance of the principle; and so in *Krewson v. Purdom*, 11 Oreg. 268.

29 Cal. 533-549. PEOPLE v. HOME INSURANCE COMPANY.

Bonds of the state are subject to taxation, p. 538.

Approved in *State v. Board of Assessors*, 35 La. Ann. 663, dissenting opinion of Bermudez, C. J.; and *Id.* 667, dissenting opinion of Todd, J.

State bonds owned abroad and deposited in this state are taxable here, p. 540.

Principle of the decision approved in *State v. County Court*, 47 Mo. 601; *Mortgage Co. v. School District*, 10 Sawy. 66; S. C. 19 Fed. Rep. 369; and *Savings etc. Soc. v. Multnomah County*, 60 Fed. Rep. 32. Distinguished in *Murray v. Charleston*, 96 U. S. 447, holding that a municipality cannot, under the guise of taxation, relieve itself of its contract obligations to its creditors; *Estate of Fair*, 128 Cal. 614, 615, noted under *People v. Eastman*, 25 Cal. 601; *Comptoir v. Board*, 52 La. Ann. 1329, noted under *Falkner v. Hunt*, 16 Cal. 167; *State v. Keokuk etc. Co.*, 153 Mo. 165, 77 Am. St. Rep. 708, quoting *Murray v. Charleston*, 96 U. S. 432; *Walker v. Jack*, 88 Fed. 579, 60 U. S. App. 129, and *New Orleans v. Stemple*, 175 U. S. 319, holding property of

nonresident taxable when in control of agent etc. Co. v. Halliday, 110 Fed. 264, sustaining with insurance commissioner by foreign corp. Co. v. Halliday, 126 Fed. 266, under Ohio statute deposited with insurance superintendent by foreign corp. for protection of Ohio policy-holders as required by Eidman v. Martinez, 184 U. S. 589. Cited to Dec. 529, note.

Personal property in the state belonging to and assessed to such owner, p. 547.

Cited to the ruling stated in San Francisco v. Board of Equalization, 66 Iowa 35 Minn. 220, and applied to property of a trustee or agent.

Description is sufficient which identifies the property with reasonable certainty, p. 549.

Cited as authority to ruling stated, in Pecunia v. 440; and San Francisco v. Pennie, 93 Cal. 470, 424, holding description of property sufficient.

Capital Stock.—Bonds kept by an insurance company as its capital stock, p. 545.

Referred to in San Francisco v. Spring Valley, 531, defining the term "capital stock."

29 Cal. 555-562. **WALDIE v. DOLL.**

Pledgor and Pledgee.—Pledgee does not lose his interest by pledging by allowing pledgor to paint them. Cited to Dec. p. 559.

Cited as authority to ruling stated, in 76 Annot.

Instructions asked by counsel, and refused to be read in the hearing of the jury, p. 561.

Ruling approved in Territory v. Harper, 1 Organ Co. v. Howe, 25 W. Va. 98.

29 Cal. 562-564. **PEOPLE v. JOCELYN.**

Continuance.—Granting or refusing of motion for continuance at discretion of the court below, p. 563.

Cited as authority to the ruling stated, in Mont. 471.

Same.—Affidavit of absent witness should be taken in criminal case unless reason to the contrary.

Cited in People v. Breen, 130 Cal. 78, noted to Dec. 28 Cal. 589; 54 Am. Dec. 304, note.

Witnesses.—Persons whose names are not indorsed upon the instrument may be examined as witnesses on the trial on the part of the state, p. 563.

Approved as authority in *State v. Boughner*, 5 S. Dak. 465; *State v. Church*, 6 S. Dak. 95; and *People v. Thiedie*, 11 Utah, 276.

29 Cal. 564-567. CAMDEN v. MULLEN.

Married Woman, acting as sole trader, may be bound by her note, p. 567.

Cited with approval in *Hickey v. Thompson*, 52 Ark. 238; so in 85 Am. Dec. 145, note; and cited, generally, as to liability of married woman acting as sole trader, in 70 Am. Dec. 691, note.

Pleading.—Rules of pleading require a denial of every averment in a sworn complaint, in substance and in spirit, and when the defendant fails to make such denials he admits the averment, p. 567.

Cited as authority to ruling stated, in *Doll v. Good*, 38 Cal. 290.

29 Cal. 567-575. HALL v. CRANDALL. 89 Am. Dec. 64.

Agency.—Agent is not liable upon an unauthorized contract in terms binding his principal, unless it contains apt words importing personal liability, p. 571.

Approved and followed in *Lander v. Castro*, 43 Cal. 501; and cited as authority to the ruling stated, in *Blanchard v. Kaul*, 44 Cal. 450, 452; *Farmers' etc. Bank v. Colby*, 64 Cal. 354; *Bean v. Pioneer Mining Co.*, 66 Cal. 455; S. C. 56 Am. Rep. 108; *Wallace v. Bentley*, 77 Cal. 21; S. C. 11 Am. St. Rep. 233; *Senter v. Monroe*, 77 Cal. 350, 351; and *Cole v. O'Brien*, 34 Neb. 70; S. C. 33 Am. St. Rep. 617. Cited in *Melone v. Ruffino*, 129 Cal. 523, 79 Am. St. Rep. 134; noted under *Conner v. Clark*, 12 Cal. 168, holding principal of real estate agents bound by that contract; *Thilmany v. Iowa etc. Co.*, 108 Iowa, 363, holding vice-president of bank not personally liable on contract; *Brong v. Spence*, 56 Neb. 641, holding husband not personally liable when contracting as wife's agent; note to *Taylor v. Reiger*, 63 Am. St. Rep. 356, on liability of corporate officers; *Anderson v. Adams*, 43 Or. 626, holding agent making contract for principal in excess of authority, to furnish water for irrigating purposes, personally liable thereon on implied warranty of authority; dissenting opinion in *Andrus v. Blazzard*, 23 Utah, 264, majority holding guardian mortgaging real property of ward to pay debts is personally liable. Cited, bearing upon the question as to when the agent incurs personal liability, in *Heffron v. Pollard*, 73 Tex. 102; S. C. 15 Am. St. Rep. 770; and so, to same effect, in 68 Am. Dec. 287, note; 87 Am. Dec. 76, note; 93 Am. Dec. 150, note; 94 Am. Dec. 326, note; 99 Am. Dec. 437, note; 100 Am. Dec. 621, note; 3 Am. St. Rep. 228, note; 11 Am. St. Rep. 234, note; 22 Am. St. Rep. 508, 511, note; 33 Am. St. Rep.

618, note; 35 Am. St. Rep. 880, note; and 48 Am. St. Rep. 914, 917, note.

General Citation.—Padley v. Catterlin, 64 Mo. App. 637.

29 Cal. 575-577. PEOPLE v. AH YEK.

Rape.—In indictment for rape it is not necessary to aver the age of the person charged with committing the crime, p. 576,

Approved in *People v. Wessel*, 98 Cal. 353; *Sutton v. People*, 145 Ill. 286; and *United Staes v. Cannon*, 4 Utah, 127. Cited in *Mitchell v. People*, 24 Colo. 534, holding proof of age unnecessary; *State v. Knighten*, 39 Or. 65, in indictment for carnally knowing female under certain age under Laws of 1895, page 67, age of defendant need not be alleged; 80 Am. Dec. 373, note, to the effect that the age, neither of the woman, nor of the man, need be averred.

29 Cal. 577-578. HODGKINS v. JORDAN.

Forcible Detainer.—In order to recover for threats of personal violence, or such conduct as clearly evinces a determination to resist by force the entry of the plaintiff, must be shown, p. 579.

Principle of the decision approved in *Buel v. Frazier*, 38 Cal. 697; *Castro v. Tewksbury*, 69 Cal. 569; *Giddings v. Land and Water Co.*, 83 Cal. 100; and *Taylor v. Scott*, 10 Oreg. 487.

29 Cal. 579-580. PEOPLE v. JACOBS.

Criminal Law.—To constitute offense of assault with deadly weapon, use of deadly weapon must be charged in the indictment, p. 579.

Cited as authority to ruling stated, in *People v. Congleton*, 44 Cal. 94; *People v. Villarino*, 66 Cal. 229; and *People v. Pape*, 66 Cal. 367. So in *State v. Godfrey*, 17 Oreg. 305, S. C. 11 Am. St. Rep. 833, holding that one may be assaulted, although in complete ignorance of the fact, and therefore entirely free from alarm.

29 Cal. 580-585. BEACH v. GABRIEL.

Statute of Limitations does not begin to run in relation to pueblo lands until a patent has been issued by the United States, p. 585.

Affirmed in *Sabichi v. Aguilar*, 43 Cal. 291, 294; *Younger v. Pagles*, 60 Cal. 521; and *O'Connor v. Fogle*, 63 Cal. 11. Approved in *Treadway v. Wilder*, 12 Nev. 114. Examined in *Norris v. Moody*, 84 Cal. 152, holding that under the act of 1863, the statute of limitations commenced to run against pueblo lands from the date of final confirmation of the official survey; and that, under the codes, which went into effect January 1, 1873, the limitation runs against such lands, without regard to the confirmation of the survey or grant, or to the issuance of any patent. And so, to same effect, in *Bissell v. Henshaw*, 1 Sawy. 560.

29 Cal. 585-589. SULLIVAN v. TRIUNFO GOLD AND SILVER MINING CO.

Res Adjudicata.—Referred to in S. C. again, 39 Cal. 464, holding that where the alleged new fact existed at the commencement of a former action in which the point in issue was the same, and the plaintiff neglected to avail himself of it, he is not entitled to set it up in a subsequent action.

29 Cal. 589-597. GIFFORD v. CARVILL.

Fraudulent Representations.—The value and richness of a mine, and its convenience to wood and water, are not mere matters of opinion, as to which the purchaser of stock from a stockholder has no right to rely upon the representations of the seller, p. 592.

Cited as authority in *Morgan v. Dinges*, 23 Neb. 279; S. C. 8 Am. St. Rep. 128; and *Hoock v. Bowman*, 42 Neb. 84; S. C. 47 Am. St. Rep. 694, and applied to representations relative to real estate. Cited to ruling stated, in 90 Am. Dec. 428, note; and so, to same effect, in 45 Am. St. Rep. 569, note.

Rescission.—A party cannot defeat an action on a note given for the price of property on the ground of rescission of the sale for misrepresentations, unless he has returned or offered to return the property within a reasonable time, if it have any value, p. 593.

Ruling approved in *Herman v. Haffenegger*, 54 Cal. 164; *Collins v. Townsend*, 58 Cal. 614, distinguished in S. C. p. 610; dissenting opinion of Thornton, J.; *Canal Co. v. Roach*, 78 Cal. 554; *Wainwright v. Weske*, 82 Cal. 196; *Hammond v. Wallace*, 85 Cal. 532; S. C. 20 Am. St. Rep. 244; *Gamble v. Tripp*, 99 Cal. 226 (a similar case of purchase of shares of stock in a corporation); *Buena Vista etc. Co. v. Tuohy*, 107 Cal. 254; and *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 386. Cited in *Field v. Austin*, 131 Cal. 384, holding restoration unnecessary when property valueless; *Wilson v. Hundley*, 96 Va. 101, 70 Am. St. Rep. 842, discussing remedies in case of sale induced by misrepresentation; *Cowen v. Harrington*, 5 Idaho, 332, contract induced by fraud cannot be rescinded after suit commenced on notes given thereunder. Explained, *Kelley v. Owens*, 507, 508, 509, action to rescind contract. Distinguished in *Maloy v. Berkin*, 11 Mont. 146, which was an equity action for cancellation of a deed. Cited in 40 Am. Dec. 330, note.

29 Cal. 597-605. WAKEFIELD v. GREENHOOD.

Pleading.—Complaint in action on promise to pay debt of another need not aver that the promise was in writing, p. 599.

Affirmed in *Vassault v. Edwards*, 43 Cal. 463; *Reagan v. Justice's Court*, 75 Cal. 255; *Broder v. Conklin*, 77 Cal. 336; *Nunez v. Morgan*, 77 Cal. 431, 432 (applied to cross-complaint upon a contract within the

statute of frauds); *Feeney v. Howard*, 79 (St. Rep. 170 (holding that a denial of the co the question of its validity under the statu 84 Cal. 280; *Barnard v. Lloyd*, 85 Cal. 132; *Co. v. Joost*, 117 Cal. 207, 208 (rule applied t an agreement by way of defense). Approved 86 Va. 1014; and cited to ruling stated, in 10

Statute of Frauds.—Promise to pay any on the promisor is void, unless in writing, an p. 604.

Cited in *James v. Lyons etc. Co.*, 134 Cal. 11 unconditional promise to accept a certain in section 3197, Civil Code; *Walton v. Mandevil* Am. Rep. 125, holding that an oral acceptance is invalid where the acceptor has no funds of at the time of acceptance.

29 Cal. 605-610. **SCHELLHOUS v. BALL.**

New Trial.—Granting or refusing of, on matter resting to a great extent in the lega below, pp. 607, 608.

Ruling approved in *Nooney v. Mahoney*, 30

If party can relieve himself, either by a ne the introduction of other testimony, or in an to do so, a new trial will not be granted on gro

Affirmed in *Doyle v. Sturla*, 38 Cal. 456; *D* 557 (holding that party surprised must apply t practicable moment and in such method as wil tion, expense, and delay); *Ferrer v. Home Mut* same effect; *Heath v. Scott*, 65 Cal. 552; and Cal. 423, case in which counsel claimed to ha prayer of the complaint. Approved as authori *Moberly*, 17 Mo. App. 228; *Albert v. Seiler*, 31 v. *Martin*, 43 Mo. App. 605; and *Gaines v. Whi* *Reeder v. Traders' Nat. Bank*, 28 Wash. 148, n trial on ground of surprise where surprise was surprised, and he did not use reasonable effort which worked surprise.

Party alleging surprise should show it by th his reach, p. 609.

Approved in *Martin v. Hill*, 3 Utah, 159. Cited 32 Cal. 212, holding that party moving must sho but that he is injured by it, and this he must case he can establish in the event of a new trial. tery, 56 Cal. 474, holding that surprise arising fr

unsatisfactory witness, the truth of which is not denied, is not a sufficient ground for a new trial.

Where facts exist amounting to legal surprise, they should be shown by the affidavit of the attorney, and not of the client, p. 609.

Cited as authority in *Martin v. Hill*, 3 Utah, 159.

29 Cal. 612-615. **McQUADE v. WHALEY.**

Appeal.—Transcript on appeal from order denying new trial must contain an authenticated copy of the pleadings, or an agreed statement of their contents, p. 614.

Cited in *Todd v. Winants*, 36 Cal. 130, holding that a summary agreed to will, in most cases, answer every purpose.

29 Cal. 615-619. **BOLTON v. STEWART.**

New Trial.—Order granting will not be reversed ~~because~~ the reason assigned for granting it is a bad one, if ~~there~~ was a good reason for granting it, p. 617.

Cited in *Borkheim v. Insurance Co.*, 38 Cal. 506, holding that the power of the appellate court in reviewing an order granting or refusing a new trial is not limited to the grounds stated by the court below. So in *Field v. Kinnear*, 5 Kan. 238, holding that when a new trial is granted the appellate court will require a stronger case for interference than when one has been refused.

29 Cal. 619-622. **SKIDMORE v. TAYLOR.**

Replevin is a Proper Remedy to recover a package of gold coin sealed up in a leather bag, p. 622.

Approved in *Sharon v. Nunan*, 63 Cal. 235, *Eddings v. Boner*, 1 Ind. Ter. 178, and *Hamilton v. Clark*, 25 Mo. App. 433.

29 Cal. 622-632. **PEOPLE v. GARNETT.**

Criminal Law.—Exclusion of witnesses from courtroom during trial is a matter resting in the discretion of the court, p. 625.

Approved in *People v. San Lung*, 70 Cal. 517; and *People v. O'Loughlin*, 3 Utah, 145.

Same.—Indictment charging a burglary mixed with a larceny charges two offenses, and is bad on demurrer, p. 625.

Cited in *People v. McFarlane*, 138 Cal. 484, on point that "burglary" is not necessarily included in "larceny"; *People v. De Coursey*, 61 Cal. 135, an information charging larceny and embezzlement of the same property; *People v. Curtis*, 76 Cal. 58; *State v. Ridley*, 48 Iowa. 378; *Territory v. Fox*, 3 Mont. 442; and *North Dakota v. Smith*, 2 N. Dak. 518. Denied in *State v. Ah Sam*, 7 Nev. 129. Cited in *State v. Hackett*, 47 Minn. 427, S. C. 28 Am. St. Rep. 391, holding that under the Min-

nesota statute, the accused may be prosecuted for each crime separately.

Same.—If the indictment charges two offenses, the objection is waived unless it is taken by demurrer, p. 626.

Ruling approved in *People v. Burgess*, 35 Cal. 118; and *Territory v. Duffield*, 1 Ariz. Ter. 70. So in *People v. Jim Ti*, 32 Cal. 62, and applied to objection to description of stolen property in indictment.

General Citation.—In *People v. Richards*, 2 Am. St. Rep. 391, extended note, as authority that a felonious intent is essential to the crime of burglary.

29 Cal. 632-635. **PEOPLE v. DWINELLE.**

Certiorari.—Writ of brings up for review only the question whether the inferior tribunal exceeded its jurisdiction, p. 634.

Affirmed in *Cent. Pac. R. R. Co. v. Placer County*, 46 Cal. 670; *Sayers v. Superior Court*, 84 Cal. 645; *Farmers' etc. Bank v. Board*, 97 Cal. 328; and approved in *Hetzel v. Board of County Commrs.*, 8 Nev. 362; and *Phillips v. Welch*, 12 Nev. 169, 178. Cited in *Garnsey v. County Court*, 33 Or. 207, denying writ of review to revise action of probate court as to claim when within its jurisdiction.

29 Cal. 637-642. **GILLAM v. SIGMAN.**

Pleading.—Misjoinder of parties plaintiff must be taken advantage of by demurrer, if it appear on the face of the complaint, and if it does not so appear, by answer, or the same is waived, p. 640.

Approved in *Hastings v. Stark*, 36 Cal. 126; *Rutenberg v. Main*, 47 Cal. 221 (case of misjoinder of parties defendant); *Trenor v. Railroad Co.*, 50 Cal. 231; *Tennant v. Pfister*, 51 Cal. 513; *Heinlen v. Heilbron*, 71 Cal. 561; *Gruhn v. Stanley*, 92 Cal. 88; *Farncomb v. Stern*, 18 Colo. 283; and *Bibb v. Allen*, 149 U. S. 504.

29 Cal. 642-643. **PEOPLE v. ROONEY.**

Judgment.—Form of, against sureties on official bond, for defalcation of principal, set forth, p. 643.

Affirmed, *Heppe v. Johnson*, 73 Cal. 270; and approved in *City of Butte v. Cohen*, 9 Mont. 442.

29 Cal. 644-658. **GRANT v. MOORE.**

Appeal.—Order granting new trial, if for any cause correct, will not be set aside because the reason assigned for it may have been wrong, p. 647.

Cited as authority in *Borkheim v. Insurance Co.*, 38 Cal. 506; and *Field v. Kinnear*, 5 Kan. 238. See, also, *Bolton v. Stewart*, 29 Cal. 615, and notes thereto, ante.

Malicious Prosecution.—Where the facts are undisputed, it is error to submit the question of want of probable cause to the jury, p. 651.

Affirmed in *Emerson v. Skaggs*, 52 Cal. 247; *Eastin v. Bank of Stockton*, 66 Cal. 125; *Ball v. Rawles*, 93 Cal. 232; S. C. 27 Am. St. Rep. 182; *People v. Kilvington*, 104 Cal. 91; S. C. 43 Am. St. Rep. 76; and *Sandell v. Sherman*, 107 Cal. 394; approved in *Pennsylvania Co. v. Weddle*, 100 Ind. 145; *Burton v. Railway Co.*, 33 Minn. 192; and *Wright v. Ascheim*, 5 Utah, 491; cited to the ruling stated, in 9 Am. Dec. 691, note; and 26 Am. St. Rep. 141, extended note, where the authorities are collected and the subject discussed at length.

In action for malicious prosecution, the burden is on plaintiff to show affirmatively a want of probable cause, p. 655.

Affirmed in *Jones v. Jones*, 71 Cal. 91; *Lacey v. Porter*, 103 Cal. 605; and *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 436. Approved in *Gurley v. Tompkins*, 17 Colo. 448. Cited in *Davis v. Pacific etc. Co.*, 127 Cal. 319, noted under *Potter v. Seale*, 8 Cal. 221; *McKenna v. Heinlen*, 128 Cal. 102, on point that want of probable cause cannot be inferred from malice.

Same.—To sustain this action, it must appear that the action alleged to have been prosecuted maliciously was determined in favor of the party injured by it, p. 657.

Cited as authority to ruling stated, in *Davis v. Stuart*, 47 La. Ann. 382; and *Ferguson v. Tobey*, 1 Wash. Ter. 277.

29 Cal. 658-661. **PEOPLE v. WINTERS.**

Evidence.—Burglars' tools found in possession of defendant may be offered in evidence, as a circumstance, if other facts justify, p. 660.

Approved in *People v. Hope*, 62 Cal. 295; so, in *People v. Sansome*, 84 Cal. 453, but in the latter case the circumstances held not to justify the admission of such evidence. Disapproved in *State v. Davis*, 14 Mo. App. 200, S. C. affirmed, 80 Mo. 54, 55, holding such evidence admissible, although there was no evidence that burglars' tools had been used in the commission of the burglary.

Appeal.—Error must affirmatively appear and will not be presumed, p. 661.

Affirmed in *People v. Ebanks*, 117 Cal. 665. Cited in *People v. Allen*, 144 Cal. 300, as to instructions where record did not show evidence.

29 Cal. 661-664. **BRUMMAGIM v. SPENCER.**

Jurisdiction.—General terms, "actions of forcible entry and detainer," as employed in the constitution, include actions for the unlawful holding over by tenants, p. 663.

Approved in *Johnson v. Chely*, 43 Cal. 304, asserting jurisdiction of county courts of actions of unlawful detainer against tenants for hold-

ing over; Ivory v. Brown, 137 Cal. 605, no 28 Cal. 120.

29 Cal. 664-673. **LEESE v. CLARK.** S. C. 28 Cal. 26.

Ejectment.—Prima facie, all who con brought must go out, if the plaintiff rec is issued. It is presumed they came in un

Ruling approved in Mayne v. Jones, 3 bee v. Dunn, 36 Cal. 150; S. C. 95 Am cases attention is called to an error in th in that the word "defendant" should be su tiff," in the ninth line from the bottom o win, 125 Cal. 156, noted under Long v. N also, in Huerstal v Muir, 64 Cal 452; an 554; S. C. 7 Am. St. Rep. 120. Cited in 3 Am. St. Rep. 60, note.

29 Cal. 673-678. **COGHILL v. MARKS.**

Intervention.—Creditors may intervene which is void as to them, p. 677.

Cited as authority, holding that an att has a right to intervene and upon a prop a prior attaching creditor, in Kimball v. Cal. 393. So, to same effect, in Leppel v. in McEldowney v. Madden, 124 Cal. 109, n 18 Cal. 378; 16 Am. Dec. 182, note; and 90

Postponement of prior attachment lien of debt not due, unless the action was com

Approved in Mendes v. Freiters, 16 Ne tachment suit was commenced in good faitl actually due.

New Trial.—Order granting, does not st assigned by the court making the order, b record, p. 678.

Approved in Borkheim v. Insurance Co., effect, in Field v. Kinnear, 5 Kan. 238.

General Citation.—Northwestern Ben. Soc 329.

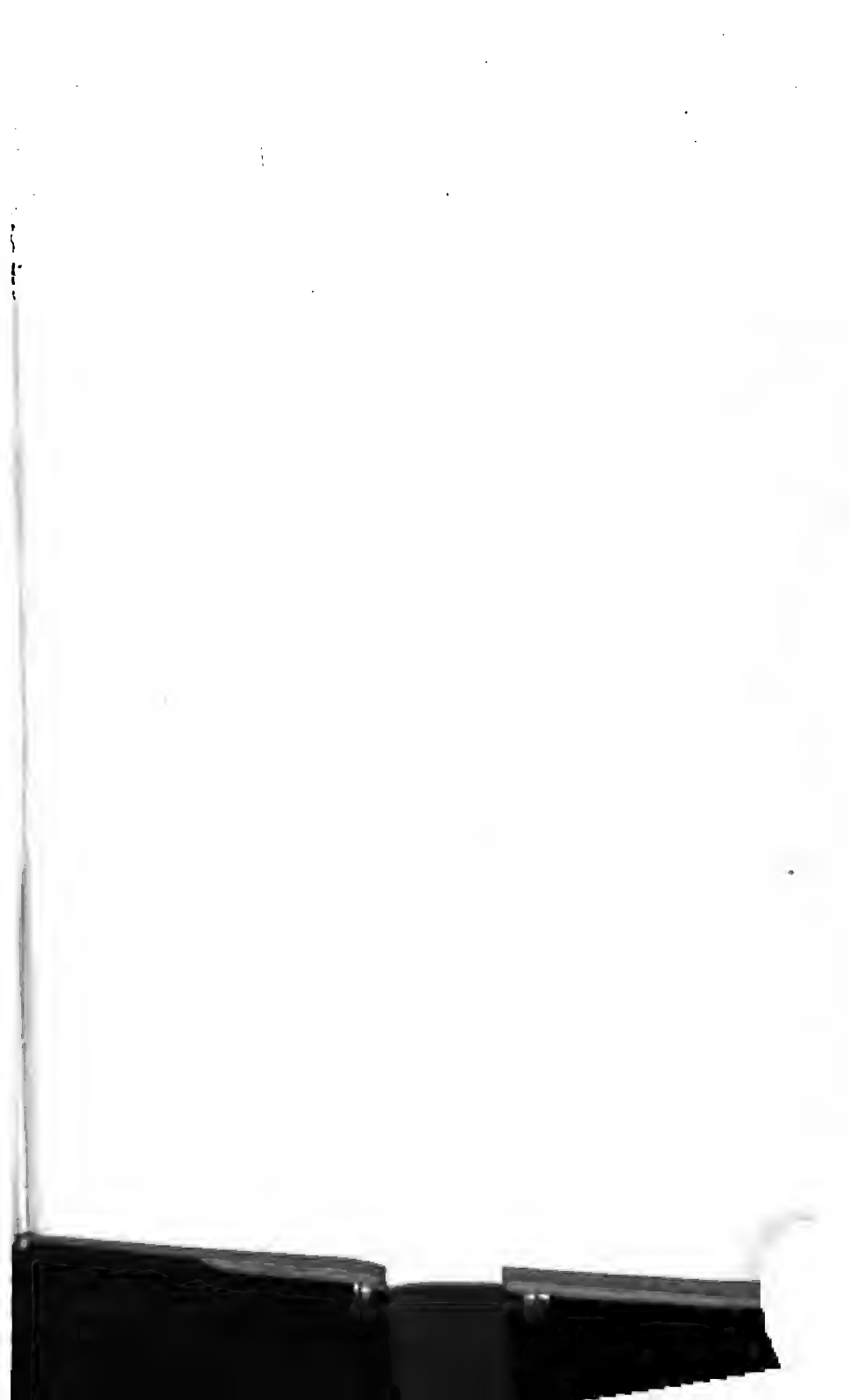
29 Cal. 678-685. **PEOPLE v. HARRIS.**

Criminal Intent will be presumed upon cused, p. 681.

Cited as authority to ruling stated, in Br

missible, not as an excuse for the crime, but on the question of intent, p. 683.

Approved in *People v. Blake*, 65 Cal. 278, case of prosecution for forgery; *Chatham v. State*, 92 Ala. 49, prosecution for larceny; *Keeton v. Commonwealth*, 92 Ky. 525, robbery; *O'Grady v. State*, 36 Neb. 322, passing forged check; *Hill v. State*, 42 Neb. 516, prosecution for murder; *Cline v. State*, 43 Ohio St. 334, malicious shooting with intent to wound; and *Lyle v. State*, 31 Tex. Cr. Rep. 115, perjury, and the evidence held admissible in mitigation. Doctrine denied in *State v. Welch*, 21 Minn. 28, which was also an indictment for voting more than once at an election. Cited in *People v. Hartman*, 27 Ind. App. 329; 87 Am. Dec. 102, note; and 40 Am. Rep. 570, note, discussing the subject.



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